IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1906.

The Interstate Commerce Commission, Appellant, v. The Chicago Great Western Railway Company, et al., Appellees.	No. 352.

REPLY BRIEF OF ARGUMENT FOR APPELLANT.

In answer to all of the argument presented by various briefs for the appellees herein, based upon the contention that the court's findings of fact overcome the findings of the Commission, we make the counter proposition:

[Note: References to pages of brief are to the brief filed by Mr. Shauer and Mr. Cowan, except as otherwise shown.]

I.

THE COURT'S CONCLUSIONS ARE NOT JUSTIFIED BY ITS OWN FINDINGS OF FACT, THE FINDINGS OF FACT BY THE COMMISSION, NOR THE EVIDENCE.

Our original brief sets out the findings of the Commission, which the court affirmed in this language: "Which findings of fact the court assumed in the beginning of this hearing and in his consideration of the case to be the real facts in the case, as required by the statute." (Opinion, record, 175, 4th column.)

At the conclusion of the opinion the court said: "Upon a consideration of all the evidence the court

holds that the prima facie case made by the findings of the Commission has been overcome by the evidence offered before the court."

Since the court made specific findings of fact as the basis of its decision, resort must be had to those findings and to the findings of the Commission to ascertain wherein the court found the *facts contrary* to the findings of the Commission, instead of assuming it to be so as appellees do; and to determine whether the court's findings, if in conflict with those of the Commission, are sustained by the evidence, instead of merely asserting it, as appellees have done.

(2) This is subject to the qualification that it is not conceded that the same effect shall be given to the findings of the court in this character of case as are given to findings of fact in actions at law. The findings of the Commission should carry greater weight and force than the report of a referee or master. They are not only prima facie evidence of the facts found, but, being the decision of a governmental agency, specially equipped to correctly administer an important law and charged with that duty, its decision carries with it that strong presumption which the law indulges in favor of decisions and findings of departments of the Government, that the same are to be deemed correct until the contrary is made clearly to appear.

Certainly it does not comport with the spirit of this important regulating statute through the means of a commission charged with the duty of obtaining special information that the Circuit Court, composed of one person, not required nor supposed to possess special information or judg-

ment in such matters, shall overrule the decision of the Commission except for some *error of law* unless it be clearly shown that the Commission was in error in its judgment.

The Commission's judgment, which is entitled to this great weight, is its judgment upon the facts, circumstances, and surroundings of the given case, and of necessity must reflect an enlightened judgment, *not dependent merely upon the evidence which was before the Commission, but which is in part the result of the special knowledge and information which the law makes it the duty of the Commission to obtain.*

In the absence of a clear showing to the contrary, the law will indulge the presumption that the Commission has properly performed its duty and has taken into consideration all the matters which should be considered and give them proper weight in arriving at its conclusion. That conclusion must always be the result of its expert judgment upon the matter under investigation, as a whole as well as upon the evidence obtained, in the prosecution of the investigation by the Commission. (See also our original brief, pp. 39–43.)

Therefore, before the Circuit Court should reach a conclusion that the order of the Commission is not a lawful order by reason of an error in *judgment as to the facts*, the court should be able to point specifically to such error of the Commission; if the Commission has erroneously found a given fact to exist which was material to the ultimate conclusion, and it is proven before the court that such finding is not in fact true, the court should be able to point to the evidence which proves it, and to make its specific finding, overruling the finding of

the Commission in the particulars named. The mere holding that the evidence overcomes the "prima facie" case, is not sufficient.

The court, as shown in our brief, pages 88 and 89, based its conclusion that no undue and nreasonable preference or prejudice existed as found by the Commission, upon the holding that the reduction of the published meat and product rates was the result of competition justifying the preference and advantage and the prejudice and disadvantage. This was contrary to the Commission's findings.

II.

COMPARISON OF THE FINDINGS OF FACT BY THE COMMISSION AND COURT.—SHOW THE SAME STATE OF THE CASE UPON THE FACTS REGARDED BY EITHER AS CONTROLLING.—THE DIFFERENCES WERE IN ULTIMATE CONCLUSIONS.

The findings of the Commission embrace pages 8 to 27 of our original brief, pages 32 to 47 of the record. The findings of the court and its opinion appear at page 176 of the record, and the findings of fact by the court appear in our brief, pages 27 to 31.

A comparison of the two shows no conflict whatsoever as to any of the essentials urged by either side, except as appears in the sixth finding of the court, to the effect that shipments, markets, and prices are not affected by the present rates. (Upon this subject see Cowan & Shaver, brief, pp. 62-66.)

1. The comparison shows that the court found "that the live-stock rates are reasonable in themselves" (brief, 27), and counsel in their briefs and arguments urge this as important, but we shall show that it is not.

One of the complaints in the original proceeding before the Commission was that the live stock rates to Chicago from Iowa, Missouri, Wisconsin, and Minnesota were unreasonable and in violation of section 1 of the act. (See original complaint, record 9, Exhibit A, Paragraph III.)

The Commission made no finding as to that, and the order is not based upon a violation of the first section. Therefore the question is not at issue. It was not given any application by the court and is as unimportant as it was before the Commission.

The Commission did find as follows: "Complainant also introduced considerable evidence tending to show that the rates exacted by defendants for transporting live stock to Chicago from points in the States of Iowa, Missouri, Wisconsin, and Minnesota are unreasonable per se, but the testimony upon that point is unsatisfactory and we do not feel justified in making a finding in relation thereto." (Brief, p. 22.)

It was immaterial, therefore, that the court should find the live stock rates to be reasonable in themselves or "reasonably low."

But if, as a condition precedent to the lawfulness of the order in this case commanding the carriers to cease and desist charging a higher rate for the live stock and the meat and products, it must be shown that the live stock rates are "in themselves" or "per se" unreasonably high the order was, upon its face, unlawful, as a matter of law rather than of fact.

In either case it was immaterial whether the court should find the live stock rates reasonable in themselves, for if the Commission must have done so to render its order lawful it failed in that par-

ticular, and its findings would, therefore, upon that theory, be insufficient to support the order.

But the facts no more justified the court than the Commission in finding these live stock rates reasonable. (See comparative rates, record, pp. 1597–1598–1588–1590–1–2; see estimated earnings and profits, 1630–31; see also our brief, 57 to 62.) Considering the volume and importance of the traffic, and that the other rates on live stock and product are lower in the same territory, the court was not justified in accepting mere opinion of traffic men that these rates were reasonably low. While the finding is unimportant, it is not supported.

Cost of Service and Relative Profits—No Conflict between Court and Commission.

The second finding (brief, 28) is "that the cost of carrying live stock is greater than that of carrying dressed meats and packing-house products," and much space is given to this point in appellees' briefs and arguments.

But that does not conflict with the findings of the Commission. The Commission found that the discrimination "is not justified by the *difference* to defendants in the cost of transportation, and is not otherwise justified." (Brief, 22.) It finds the *profits* greater in transporting live stock. If that were not so, the volume of traffic in live stock is infinitely greater, which entitles it to the lower basis of rates.

The Commission in its findings (brief, 14) thus states the matters urged before it in justification of the discrimination:

"The Chicago Great Western contends that the discrimination is justified, first, by difference to

the carriers in the cost of transportation, and, second, by competition created by the packers, as hereinbefore described. The other defendants rely for their justification upon the competition created by the Chicago Great Western Company in making said contract and publishing and enforcing rates in accordance with its provisions."

A review of the facts concerning the relative cost of carriage and the relative profits and the various relative items of expense incident to the business is found in the report and opinion of the Commission (our brief, 14–22). The Commission specifically finds that the discrimination is not justified by the *difference in the cost of transportation*. At page 15 it points out the probable average relative *profits* upon the calculation there presented.

Not one item of the Commission's findings upon the subject of the cost of transportation or profits is controverted by any finding of the court. Neither does the court find contrary to the ultimate finding of fact by the Commission, on page 22 of the brief, that the discrimination is *not* justified in the *difference* in the *cost* of transportation. The court does not claim that it was justified by difference in cost, nor did Mr. Baxter in argument.

In other words, the Commission came to the conclusion that the *difference* in the cost, whatever it might be to the different defendants, and under different circumstances and conditions of handling the traffic, which admittedly varied, did not justify the discrimination. The court not only did not find to the contrary, but it did in nowise hold to the contrary. The finding that it costs more does not conflict with the findings of the Commission; the court

does not find any item of cost and in nowise states the relative *profits* in the transaction.

In subdivision (b) of its opinion, the court said (Cost of Service): "This has not been an important factor in the opinion of the railroad companies in the past, nor their practice, but in this case all seemed to agree that the cost of service ought to be an important factor in determining the rate. Mr. Stickney was of the opinion that the cost of service arrived at intelligently by a body of experts would be the proper basis upon which to determine fairly to everbody the rate to be adopted, and this could be mathematically figured out all over the country. The other witnesses stated that this cost could not be obtained at all accurately, only approximately."

In section 2 of the opinion the court said: "Upon the question of the comparative cost of the service to the carriers in carrying dressed meat and packing-house products and live cattle and hogs a great deal of testimony was taken on both sides." The court then points out the character of the evidence and what the witnesses claimed. The court in its conclusions of law says: (2) "The cost of service to the carrier would he an ideal theory, but it is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling."

But regardless of whether the cost can be ascertainable with approximate accuracy, it is commercially and practically impossible to base rates upon an equivalent of profit relatively per 100 pounds or per car or per dollar's worth, or by the distance.

It therefore appears that the court did not endeavor to ascertain the facts further than to hold

that it cost more to carry the live stock, and that the court agreed with the Commission that the discrimination is not justified by the *difference* in the cost of the service.

Therefore, the findings of the Commission are not overcome by the finding of the court in that particular.

Of course, we are assuming that the mere fact of making a decree does not have the effect to overturn every finding made by the Commission.

It is not the spirit of the Act to Regulate Commerce, nor is it the rule of equity, that the decree like the verdict of a jury or the findings of a court in actions of law, resolves all questions of fact against the party cast in the suit, where there is any evidence supporting it.

Risk of Carriage.

Upon this subject the Commission found, "Evidence concerning risk assumed by the carriers in transporting the different kinds of traffic was very conflicting, but the damages paid are such a small percentage of the revenue received that they are not a very important factor." (Brief, 17.) The risk is of course reflected in the damages paid.

The Commission made no finding as to whether the one or the other class pay the greater percentage of damage, but held that it was so small in either case that it was unimportant. The difference on the average per car or per dollars's worth is a negligible quantity.

The court found that "the evidence shows that the defendant railroad companies pay out a much larger amount in damages arising from carriage of

live stock than they do for losses arising from the carriage of dressed meat and packing-house products in proportion to the value of the products carried, and more in damages per car regardless of the value. This makes the risk for carriage greater for live stock. The result is that the value of the service is not such an important factor in this kind of a case as it is considered to be in ordinary cases." (Brief, 28.)

As to the foregoing finding of the court, we assert (1) that it does not conflict with the conclusion of the Commission upon the subject; and (2) the finding is exactly contrary to the evidence as to the defendants carrying the largest volume of the live-stock traffic. Mr. Gardner, the general manager of the C. & N. W. Railway, which handles 100,000 cars of live stock per year, testified (Record, p. 325) that the loss and damage to packing-house products amounted to about 85 cents per car, and again (Record, p. 383) inserts the estimate "Account damage and loss" 85 cents per car, in figuring the net earnings on fresh meat and packing-house products.

At the same page he inserts in his estimate of the live stock shipments "Cost account damage and loss and injury to stock men in charge, $1.15 per car," but this is too high, for at pages 367 and 368 he testified that Mr. Richards, the damage claim agent from whom he got the figures, kept the records, and by referring to Mr. Richards's evidence (Record, p. 1903) is found a statement of the detailed loss and damage to live stock for the years 1902 to July, 1905, which averages 78 cents per car on the C. & N. W. Railway, estimated on a basis of 75,000 carloads per year, but

the witness testified that the actual number of carloads was about 100,000 per year.

Mr. Gardner has testified at page 324, "I think the personal injuries would average $25,000 a year riding in cabooses. Our damage and loss is about a dollar a car."

Mr. Richards made a statement for the six months from June 30, 1904, to January 1, 1905, showing the accidents to persons riding on stock trains to be $2,500. (Record, p. 1900.) For the year 1903 the total account was extraordinarily large, but that was caused by a serious wreck at La Fox, which cost the company $49,850. By referring to page 1902 will be seen the amounts paid in settlement of cases of injuries to stockmen, and it shows that in the year 1903, 42 men were injured, damage $49,850. For the year 1904 11 men were injured, damage paid, $2,691, and for the year 1905, 13 men injured, damage, $2,077.

It therefore appears beyond dispute that, as to the Northwestern Railway, the average of the entire loss and damage for the period given was 78 cents per car of live stock, and for packing-house products and dressed meat 85 cents per car.

Mr. Crosby, for the Burlington, testified that for the year ending June 30, 1905, the total loss and damage to live stock and attendants in charge of live stock was $41,773, of which the damage to men in charge was $5,345. (Record, p. 238.) The number of cars handled was approximately 104,000 cars (record, p. 1504, Miller's evidence), and the loss and damage therefor would average less than 40 cents per car.

Mr. Cusey showed the exact amounts paid to S. & S. packing concern for damages to shipments

of their output at Kansas City for three years, 1902 to 1904, inclusive, on 14,129 cars meats and products, $34,047, or $2.41 per car. (Rec., 1545.) 2,489 live stock to Chicago or New York, $2,649.93, or $1.06 per car. (Rec., 1539). For detail see this witnesses evidence of exact facts (Record, pp. 1517 to 1545.)

[NOTE: At p. 1530, the loss and damage to live stock is erroneously stated at $26,049.93, should be $2,649.93, as shown on pp. 1527–1539.]

Fundamental Propositions as Cost of Service and Reasonableness in Discrimination Cases.

Nearly every traffic man was asked whether rates relative or otherwise were ever made upon the basis of producing an equivalent of earnings, gross or net, or an equivalent profit as compared to rates on any other commodity or as between other places.

The uniform answer was that such rates are not so made and it will be impossible to do it. (See Gower's evidence, Record, 769.)

Naturally this must be so. It remains unquestioned in this case and in the history of the subject.

Neither in law, in practice, nor in railway economics, is there any rule by which rates relative or otherwise are based upon the 100 pounds any more than upon the dollars' worth, nor to produce an equivalent profit.

This proposition, undoubtedly true, answers a

multitude of arguments of appellee's counsel, which are based upon opinions and the hypothesis that relative rates are determined by the cost of carriage and earnings per hundred pounds, especially Mr. Severance's Analysis of Testimony, pages 1 to 73. It likewise completely refutes the numerous *opinions* of railway representatives based upon the hypothesis that the profit to the railroad must determine the relation of the rates. The hypothesis being false, the opinions are worthless.

Courts when determining reasonableness of a schedule for all traffic consider the cost of service material, for it is essential, as a whole, in ascertaining the net earnings as a factor in the ascertainment of a fair return.

When testing the reasonableness of rates on a given commodity or as applicable only between two or more places, where the reasonableness of the rate in the given case does not involve the fair return upon all the companies' investment, the cost of service is only important to determine whether the particular business furnishes some remuneration. In such case its importance is far less than in a case involving the whole schedule.

When the question for determination is the relation of the rates as between two competing commodities carried to or from competing points—that is to say, the relative reasonableness, the cost of the service is of the minimum importance in all such cases and oftentimes the relative cost of service is of no importance and must be eliminated.

Mr. Baxter admits that must be so upon all competitive rates. Equally it must be so upon rates on competitive commodities.

The foregoing propositions are fundamental, for unless they apply the public interest and the interests of shippers and localities would be obliterated, and the following factors, always deemed material and often controlling, would be given no effect, viz:

(1) That the public be not unduly taxed so as to pay in the end more than a fair return upon a fair value of the property used in the public service.

(2) That those commodities which can best afford to bear it should pay the greater burden.

(3) That necessaries of life and large important products of the farm be given as low rates as possible to encourage production and benefit the consuming public.

(4) That no undue or unjust discrimination be practiced as between competing localities; as between competitive articles of commerce; nor as between persons engaged in the production or commerce of such articles.

If the foregoing propositions are correct, then in this case the question of undue preference or unreasonable prejudice or disadvantage can not be determined upon the equivalent profits in the transaction of transporting a carload of the live stock from Missouri River to Chicago compared with transporting a carload of the products of live

stock any more than from the total profits from the one business as compared with the other.

And it follows that the relative cost of the service and the relative profits would be of the least importance; for to be guided by those factors would often produce the discrimination.

Further, the difference in cost is so meager and doubtful that it was correctly held by the Commission that the discrimination could not on the account of that difference be justified, as we shall see and as presented in our original brief, pages 47 to 62.

Without particularizing appellee's points, this conclusion of the Commission is a practical answer to all of the argument of the appellee's counsel upon the subjects:

Reasonableness of the rates in themselves; Relative car loading; Relative train loading and tonnage; Weight of cars; Weight of bedding; Cost of cleaning; Return loading; Speed of train; Cost of car mileage; Terminal expenses; Repairs of cars; Loss and damage; Stock-yards expenses; Return transportation; Opinions of railway officials.

As we have shown in our original brief, pages 47 to 62, the relative profits per car upon the whole are greater in the case of the live stock than the product, in the ascertainment of which the foregoing items are considered. And it is manifest that if the profits to which the carriers are entitled are measured by the value of the commodities per hundred pounds, such profits are twice as great in proportion to the value of live stock as its product.

The live stock and its products being highly competitive as held by the Commission, the relative value of the products is the more important factor than the relative weight. The court admitted the value was twice as great, but refused to give it any weight.

From what is said it is manifest that the interest of the public is quite as important a factor in determining these relative rates as is the interest of the railroads; indeed, the interest of the railroads must often be ignored wholly or partially to secure a just relation of rates.

If the relative cost of service and the relative profits to the carrier per car or per unit of traffic based on the weight shall determine the relative rates, then the carriers' interest alone would be considered and the public interest and all other interests necessarily excluded.

This is exactly what the court held, for it was his conclusion that the carrier was under no obligation to maintain the former relation of the rates, because to do so it must reduce the live-stock rates to the level of the rates upon the product. That would lose to the carriers a certain amount of money, but not affect them in any other way. It was this erroneous view which led the court to overrule the conclusions of the Commission.

No Effective Competion Except Eastward out of Missouri River.

The court found that there was some competition to the Gulf. (Brief, 28–29.) While this does not conflict with the Commission, we give it space for the purpose of remarking that no one claimed that the eastbound rates in question were in any

way affected by the southbound or the westbound rates on dressed meat or packing-house products. It only moves in that direction for local consumption, at much higher rates. No dressed meat is sent via Gulf ports for export, and little other products.

Chicago Great Western Railway as Longer Line from Kansas City Unimportant.

The court finds that "The Chicago Great Western Railway Company was the longest road from Chicago to Missouri River points."

This does not conflict with the findings of the Commission, as it estimates the average distance as 500 miles. (Brief, p. 10.)

Mr. Stickney treats the distance from Chicago to Omaha as 500 miles. (Record, p. 622.) No one claimed any particular advantage or disadvantage by the use of the average distance found by the Commission. The argument here is the first of that claim as a factor in inducing lower rates on the product than live stock.

Chicago Great Western Railway First Reduced the Rate under Contract.

The court finds "This cutting of the rate by the Chicago Great Western Railway Company was not the origin of competition; that had existed legally since March, 1902, between defendant railroads, and also between them and the Atchison, Topeka and Santa Fe Railway Company." (Brief, p. 29.) It was the origin of reduced published rates.

Taken in connection with the statement just preceding that, "After said injunction was granted, the defendant railroads obeyed it, and until August of that year, the said traffic was carried

under competition between the defendant at the rate of 23½ cents from Missouri River points to Chicago, and 25 cents from St. Paul to Chicago, etc., as set out above." (Brief, p. 29.) This is an anomalous conclusion.

It is not disputed that all of the railroads except the Chicago Great Western reduced their rates to meet the rate established by the contract of August, 1902; and that, previously, the published rates had been observed. By what mental process could the court therfore conclude that the cutting of the rate was not the origin of competition? It admittedly was the cause of the reduction of the published rate, whatever may have been the motives and the actuating cause inducing the Chicago Great Western to make the contract and put in the rate.

While there may have been competition to get the business, it had not reached the point of varying from the published rate according to the court's finding; therefore, of what importance is it that there was competition for the business at the published rates? That the Chicago Great Western decided to get an advantage by the secret contract goes without saying, and that it was the moving cause of disturbing the existing relation of the rates is so plain that it is singular that the court apparently attempts by the finding quoted at the beginning of this paragraph to excuse the Great Western from the consequences of its act.

And it is appropriate to say further that the theory advanced by Mr. Baxter that by the Great Western contract a higher basis of real rates was established than had theretofore existed on dressed meat and packing-house products meets the charge

of unlawful discrimination is not well taken, because—

1. There was no fixed amount of rebate paid.
2. It is not shown to whom it was paid.
3. The public and trade in general should not be affected by the secret arrangement. (Mr. Baxter's brief, p. 37.)

Effect of the "Present Rates" on Prices, Markets, and Shipments.

The court, in its sixth finding (Brief, p. 30), said: "That the present rates have not materially affected any of the markets, prices, or shipments; that they are reasonably fair to Chicago and to the shippers; that the shipments of live stock from points between Chicago and the Missouri River and St. Paul are as great in proportion to the volume of business as before the present rates were made."

This subject is treated in our brief under the heading "Commercial Relation of Live Stock and Its Product," pages 62 to 69.

The Commission upon this subject found (Brief, p. 22): "That the facts shown (statistical data of receipts, establishment of markets, etc.) would tend to produce the effect claimed for them is evident, but in that connection it is impossible to determine to what extent each of the facts was effective." (See Crossly's evidence, Record, 261, to same effect.)

The Commission, as the context will show, here had reference to the evidence showing the relative receipts at the various markets in question, as tending to prove the discrimination as against Chicago in favor of other markets, and the evidence of the defendants showing the improvements in market conditions at the other markets, etc.

On the whole, the Commission found that "The discrimination against the transportation of live stock to Chicago from the shipping points in question brought about by defendants' action in establishing and putting in force upon the products of live stock rates of transportation lower than those contemporaneously exacted by defendants for the transportation of live stock between the same points injured the live stock market of Chicago and those interested therein." (Brief, p. 22.)

The Commission further found that it "therefore subjects the traffic in live stock and the Chicago live stock market and those interested there, including complainant, to undue and unreasonable prejudice and disadvantage and gives to the traffic in the products of live stock and shippers and localities interested in such traffic undue and unreasonable preference and advantage." (Brief, p. 22.)

Therefore, on these points the Commission and the court were at exact varience.

That the court reached its conclusions because of the failure of the Commission to give the weight to competition which the court thought proper, and not because of a different state of facts, is shown at pages 62 to 69 and pages 77 to 83 and Subdivision VII, pages 83 to 96, of our original brief.

It is not claimed that the court had any different evidence to support its sixth finding, above copied, than did the Commission; they simply reached different conclusions.

The receipts at the Missouri River markets from 1896 to 1904 (brief, p. 64) show an increase of

about 100 per cent for cattle, about 200 per cent for hogs, and about 45 per cent for sheep, from the East to the Missouri River. (See record, 1578, 1580, and 1581.)

Take the two periods 1895 to 1899, and 1900 to 1904, inclusive. There was an increase of the latter period over the former in receipts of live stock from all sources at the Chicago market of 28.6 per cent in cattle, 36.7 per cent in hogs, and 136.57 per cent in sheep. (Record, 1554.)

The increase was large for 1904 as against 1900 or 1901, 1902, and 1903, showing the largest increases in cattle.

There was a falling off in the number of hogs from Iowa to Chicago, 1901 to 1904, of practically 25 per cent, cattle being about the same for 1904 as was shown for 1901.

There was a large increase in the volume of business from points *east* of the Missouri River to the Missouri River markets during the corresponding period. (Record, 1577 to 1582. See also brief, p. 63–65.) It is important to note that the meat and products move eastbound. (Record, 259–60.)

Now, since the territory between the Missouri River and Chicago is constantly contributing less live stock, or at least not showing any increase to Chicago, and since the live-stock business is increasing in the State of Iowa, and since the Missouri River markets at St. Paul and the interior packing-houses in Iowa are making rapid increase in their output shipped eastbound, there must be some cause for it. The Commission quite correctly found that it was impossible to determine

to what extent each of the facts was effective, including, of course, the difference in the rates, but the effect is certain.

The Commission came to the conclusion that the relation of rates was sufficiently effective to constitute an unjust discrimination. The court thought not, because competition caused the lowering of the product rates.

The court held "that the present rates have not materially affected any of the markets, prices, or shipments."

There is no sufficient evidence in this record to justify the court in that conclusion, when the volume and direction of traffic is considered.

Mr. Mahoney, the chairman of the Western Trunk Line committee, which is an organization of the various railroads running west of Chicago (Record, 1391), prepared statements showing the tonnage and revenue of live stock, packing-house products, and dressed meat moving eastward from the Missouri River through the Mississippi gateways. (Original record, 2053A, Exhibit 1, 2053B, Exhibit 2, and 2053C, Exhibit 3. Printed record, 1392–1394.) These show that from 1902 to 1904 the shipments out of the lower Missouri River crossings, Kansas City, St. Joseph, etc., of dressed meat increased for 1904 over 1902 11 per cent; packing-house products, 17 per cent.

Out of Omaha district for the same period dressed meats increased 13 per cent; packing-house products 10 per cent. Out of St. Paul, shipments eastward of meat increased 117 per cent; packing-house products, 53 per cent.

As above shown, live-stock shipments into Chicago from the intervening district did not mate–

rially increase; but this statement of Mr. Mahoney shows that the shipments out of Missouri River points eastward through Mississippi River gateways, presumably to Chicago, principally, increased out of lower Missouri River crossings 34 per cent in the same period and out of Omaha 53 per cent.

It must be borne in mind that these shipments of live stock moving out of Omaha, Kansas City, and St. Joseph were not moving upon the 23½-cent rate, but on the balance of the through rate, as that traffic originates west and south of the Missouri River of generally 16¼ cents, often as low as 12 cents, from Missouri River to Chicago.

So therefore it is practically demonstrated that the east-bound movement of both dressed meat and packing-house products, and live stock which moves at the old balance of the rate, was proportionately greatly increased, while the live stock moving at the 23½-cent rate from interior points shows practically no increase and, in fact, a falling off.

It must be noted that the relative west-bound movement to Kansas City in the tables referred to in the record was affected by the establishment and building up of the St. Joseph market, dividing the Kansas City trade, which accounts for the fact of a falling off to some extent of the traffic west bound into Kansas City. The southwestern Missouri River points, including Kansas City and St. Joseph, should therefore be considered together.

It furthermore must be borne in mind that Chicago, because it is the great market which fixes the prices paid elsewhere, enjoys a patronage, notwithstanding the obstacles of a higher rate of freight. In other words, it partially overcomes the disad-

vantage, but that does not lessen the disadvantage to the shipper who pays it.

It is not a case, therefore, of different evidence before the court which led it to make its finding that shipments were not affected, etc., so much as reaching a different conclusion as to whether the discrimination was undue or unreasonable.

Furthermore, it must be observed that the court did not find that Commission was in error in holding that the *difference* in rates did produce an effect upon the shipment; it only held that it had not materially affected the markets, prices, and shipments; but the question is, Did it, on the whole, work a disadvantage in rates to the shippers which was unjust?

Furthermore, this finding of the court does not establish its ultimate conclusion that no undue preference or advantage was given; for the unjust disadvantage may exist, and yet the shipments might not be materially diverted, though the evidence does not warrant the claim of no diversion.

As pointed out in our brief, at pages 62 to 69, the lower rate subjects the shippers necessarily to an unreasonable prejudice and disadvantage.

Effect of Rates on Shipments—Evidence.

That the relative rates must affect the direction of the shipments is made manifest by the protests filed in the form of intervening petition by the several stock-yards companies at the Missouri River and at South St. Paul and the packers at the interior points. They must regard the relation of rates as giving them a preference or advantage, and that to change the same would produce an effect. It is as necessarily true that the change

from the previous basis must have produced an effect. To deny this is to deny the law of cause and effect, and that is in effect what the court did by its sixth finding. Of course the effect of other causes may offset in whole or in part this effect.

There is no sufficient evidence upon which the court could base that finding, unless it is mere unsupported opinion of interested parties. It can be but a reflection of a condition of mind, not the result of a due consideration of the evidence.

Mr. Eaton, the manager of the Sioux City stock yards, testified (record, p. 892–893):

"Q. State what the effect would be upon the interests of the Sioux City market if the rate on live stock to Chicago should be reduced to the present rate on packing-house products.

"A. The rate through all that country now, the difference between the rates to Sioux City and Chicago, is less than the packing-house rate from Chicago to Sioux City.

"If the rate from the territory in western Iowa is still further reduced to Chicago, it widens the difference, and it will take more stock to Chicago and less to Sioux City, or compel the purchasers at Sioux City to pay a higher rate proportionately in order to get the stuff to Sioux City."

Again, at page 897, when questioned by the court, the witness testified:

"Q. What effect would it have on your market if the packing-house rates were raised up to where they were before?

"A. That would make it cost the packer there that much more to ship his product east and it would make a great difference in the other rates.

"Q. Have you seen any difference since those rates were put where they are, in regard to the shipments to your market?

"A. We think we have seen some little difference, but not very much.

"Q. It would not make much difference if it was put back, would it?

"A. Except this thing, Judge, that during the time these rules have been in effect our market has been crippled because a packing house burned and we have only had half the capacity for slaughtering there, and now the burned house has been rebuilt and the market is coming back to the original position and is growing so we were not in a position to be able to make a good estimate as to the condition of this rate."

By Mr. COWAN:

"Q. What determines the price paid at Sioux City for live stock? Do you gauge the price, do the buyers, or is it the market price paid at any other place or places, and if so, where?

"A. As I understand it, there is no market in the West that the market opens until they hear reports from all over the country as to the receipts, and the Chicago market is the earliest market in the day, and we get the prices at Chicago and the receipts at all other markets. We get reports of the run of the stock not merely at Sioux City, but the runs at all markets have some factor in determining the price.

"Q. The market at Chicago is the principal one that is looked to for setting the pace?

"A. The market at Chicago is the largest market in the United States."

Mr. Eberhart, a pork packer from Austin, Minn., testified, at page 665, that his concern has to pay a bonus of about 5 cents per hundred pounds to induce shipments to his packing house at Austin.

And again, at page 669, he testified:

"Q. Now, do you pay the price based upon the price being paid anywhere else?

"A. Yes, sir.

"Q. On the price being paid where?

"A. Chicago, generally.

"Q. How do you get your information?

"A. We get it by the Postal Telegraph Company.

"Q. Do you send any postal cards or notices of what you are paying for hogs and how many you want?

"A. Yes; we send postal cards.

"Q. Then it is on the basis of these prices that you offer that shipments are made, practically?

"A. Yes, sir; very largely.

"Q. Where do you ship your products for sale?

"A. In carloads, mostly to the South and to Chicago."

And again, at page 670, as follows:

"A. I think that the present differential between the rate on live hogs and packing-house products makes it possible to show an increased business.

"Q. That would be the tendency of it, would it?

"A. Yes, sir."

Mr. Flower, general manager of the South St. Paul Stock Yards Company, testified at page 789:

"Q. General, you say that the prices you pay at St. Paul are in all cases not less, sometimes greater, than the price on the same class and kind of live stock as that paid in Chicago, minus the freight to Chicago?

"A. Yes; I think that is almost absolutely correct. There might have been, perhaps, some cases where it would vary a little.

"Q. How long has that been so?

"A. Well, it has been so during all the time since Swift & Co. have got thoroughly established on that market.

"Q. And how long has that been?

"A. Well, I should think that statement of fact is true for five years.

"Q. Is that a fact that is generally understood?

"A. It is the fact as understood by us people at South St. Paul."

And again at page 792:

"Q. If the rate from St. Paul to Chicago on live stock was reduced, then that would induce the shipper to ship more live stock in there because he could get a better price?

"A. If it was reduced to Chicago?

"Q. Yes.

"A. Well it would not induce him to come to our market. It would induce him to go to the Chicago market."

Mr. M. P. Buel, president of the Chicago Live Stock Exchange, testified, at pages 1266 and 1267:

"Q. Is the market at Fort Worth, Kansas City, and St. Louis determined in whole or in part upon the market in Chicago?

"A. I think so. Chicago is the controlling market, because of its largeness.

"Q. Chicago is much the largest and most important market in the country?

"A. Yes, sir, on live stock.

"Q. Do you know whether or not the receipts in the yards here of a morning and the price at which the cattle and other live stock is sold, are immediately telegraphed to those various markets.

"A. The receipts of live stock is always telegraphed early in the morning to the other markets, as to what it is in Chicago.

"Q. Do you know whether or not anybody telegraphs the prices to be paid?

"A. The big slaughtering houses. Those big concerns advise their buyers in the other markets, the conditions, and give them a general idea, as I understand it, as to what they are buying cattle for on these markets at that time."

Mr. Foster, a pork packer of Ottumwa, Iowa, testified, at pages 644 and 645, that he makes his

purchases largely by sending out mimeographed postal cards to hog raisers changing the rates offered from day to day. He testified in part as follows:

"Q. The circular states the grade and the price?
"A. Yes, sir.
"Q. The grade and price where?
"A. At Ottumwa.
"Q. If a man ships his hogs in and they fall within the goods of weight named in your circular, you pay him the price named in the circular?
"A. Yes, sir.
"Q. Do you pay the freight?
"A. We pay the freight, but deduct it from his bill.
"Q. It comes out of his pocket?
"A. It comes out of his pocket; yes, sir.
"Q. How do you come to change the price? You spoke of changing the price.
"A. We change the price by the changes in Chicago. The Chicago market governs our prices.
"Q. How do you get that information?
"A. By wire every morning.
"Q. And by wire every night?
"A. Well, the hog market is practically over by 10 or 11 o'clock in the forenoon.
"Q. You get your wire that day and send out your circulars if you make a change?
"A. Yes, sir.
"Q. From whom do you get your information in Chicago?
"A. Well, the telegraph companies—the Western Union has a live stock reporting bureau and so has the Postal Telegraph Company, and we get both markets.
"Q. So it comes from the reporting bureau of the telegraph companies?
"A. Yes, sir."

The witness explained, however, that for some special reasons, when it became necessary to in-

duce hogs of a particular class to move to his packing house, he was compelled to pay more than the Chicago price minus the freight rate. After explaining that, the witness testified, at page 646:

"Q. So your basis is the Chicago market plus your desire for hog?

"A. Very largely.

"Q. How would it make any difference with you, then, if the freight rate on hogs were reduced 3 cents a hundred pounds?

"A. Why, it would make that same difference. We would have that much more to pay for the hogs; we would have 3 cents more to pay for the hogs.

"Q. If you don't base your prices on the Chicago prices, I don't see how that would be so.

"A. Well, it is based on the Chicago prices."

And again the witness testified at pages 646–647:

"Your idea is, then, that in the price you pay for hogs you get the advantage of the difference between the rate of freight to Ottumwa and the rate of freight to Chicago?

"A. Yes, sir. The lower the freight on live hogs the better, of course, for the interior packer.

"A. I wish to correct that answer and say, the higher the rate on live hogs to Chicago the better for the packing house."

From the foregoing it is plain that the court is in error in finding that the relation of rates does not affect the markets, shipments, and prices, if the court really meant that. The only explanation which could be made, as it appears to us, is that what the court meant by the term "present rates" was making public a rate that had been secretly given at various periods.

The witness Wilson testified, at page 1034, that the price of hogs at Cedar Rapids was based upon

the Chicago market, which was repeated by the witness at page 1059.

The eighth finding to the effect that the welfare of the public, including shippers, consumers, and all localities and markets, does not seem to be materially affected by the present rate, is involved in the sixth finding and in the ultimate conclusion of the court that there was no violation of the third section of the act.

It thus appears from the foregoing review of the findings of the court, as compared with the findings of the Commission, that the court was not justified in its sixth finding for want of evidence on which to base it, and the evidence proved the contrary to that finding. The same necessarily follows as to the eighth finding.

It seems, therefore, when reduced to the ast analysis, that the conclusion of the court that the third section had not been violated is but the reflection of the opinion of the court made from the same real state of the case as that considered by the Commission.

As we have seen under Paragraph VII, pages 83 to 91, of our original brief, the conclusion was not justifiable.

The court states in its opinion in the statement of the case, paragraph 9, that "the testimony showed that the Santa Fe Railroad Company had cut its live stock rate to 12 cents for a short period after August, 1902, when the above rates in question went into effect, and that such lowering of the rates of that company did not increase its business to Chicago."

There may be some expressions of opinion on the

part of Mr. Peabody to that effect. It must be noted that Mr. Peabody does not claim to know everything, although he is a statistician. He was not called upon to produce the actual figures of the live stock shipped from points reached by the Santa Fe for the period during which the 12-cent rate was in effect, compared with the period of the previous year when those rates were not in effect; nor were the conditions which might effect the movement on the Santa Fe sufficiently gone into to prove what factors might control the movement.

Mr. Bird filed with the Interstate Commerce Commission a statement as a part of his evidence, which is in this record at page 2035, wherein is shown the actual shipments of live stock from Kansas City, Leavenworth, Atchison, and St. Joseph from August 15 to December 21, 1901, and for the same months in 1902. The 12-cent rate was in effect from August 15 to December 21, 1902.

These figures show an increase of the shipments via the A. T. & S. F. Railway during that period of practically 100 per cent.

There is no other evidence upon the subject, and the statement made by the court is utterly without foundation. There may have been no increase in cattle shipped, but the rate was on *live stock*.

Mr. Peabody did show at page 1369 that the shipments from August 1 to December 31, 1903, via the Santa Fe line, were pretty nearly equal to the shipments August 1 to December 31, 1902, but he did not show that 1902 shipments increased over those for 1901. He does show that 1904 shipments were very much less than 1902 for the same period. So that the comparisons for 1901 and 1904 show that 1902 shipments are very much greater, which

may be attributable to some extent to the rate adjustment. Certainly the court could not hold that it was not. Then the proposition is absurd, for as everybody knows, cheaper rates induce shipments, other conditions remaining the same.

Remarks Touching the Opinion of the Court.

The court seemed to be greatly impressed with the number of railroad witnesses who expressed the opinion that the rates charged were not more than reasonable. That was a mere opinion which one must necessarily expect and will find ever present from men who make the rates and feel under obligations, of course, to contend that they have not made them unreasonable. Traffic men almost universally defend their rates.

In subdivision 2 of the court's statement it was pointed out that much evidence was taken as to the cost of service, and it is stated that all of the witnesses for the railroads agreed upon the different items of expense in handling live stock. Space forbids the pointing out of the varied expenses and various figures given, but the fact is that no two of them agree, as an examination of the record will show, except in their uniform effort to magnify the expenses of the live-stock traffic.

The court further states that many of the witnesses for the defendants "made complete and accurate statements of the different items that they they thought ought to be considered in determining the cost of carriage." The fact is that no witness who made a statement giving figures to show the different items claimed that they were accurate. They were mere estimates, and it was

impossible for them to be accurate because no two witnesses made the same showing.

If the statement of the court was correct, that these witnesses made accurate statements, it is singular that the court should have said in paragraph (b), subdivision 4, that "The other witnesses (than Mr. Stickney) stated that the cost could not be obtained at all accurately, only approximately."

Again, the court states that there was an expense of from $800 to $1,400 for stock yards at every shipping place. The evidence in no sense warrants that. They are of that value in some shipping places. That is as far as the evidence goes.

(See Mr. Gardner's table, record, p. 339; also evidence, record, pp. 1039–1042, 1290 to 1293, where the yards of the Northwestern road are shown to be the best.)

The court repeatedly claims that shipments are not affected by the relative adjustment of these rates and that the live stock shipped out of Missouri River are all shipped by the proportional or balance of the through rate. Yet in section 5 of the statement the court says that the evidence tended to show that a large number of cattle were driven in from points east of the Missouri River to those markets. What becomes of those cattle? Undoubtedly they are not shipped eastward because they can not be shipped on those rates (23½ cents).

The court further stated in paragraph (a), section 4, of the statement that the witnesses all agreed that it had been the practice for years and was proper for the railroads to exact all the traffic would stand. The railway employees agreed to it, but no one else thought that it was proper.

The court then states in subdivision (e) that

they all agreed that competition was the greatest factor in determining the rate. So it is, but it may result in discriminations to him who can get the cheaper rate and against him who suffers from it, as has happened here.

In subdivision (f) the court states with respect to "shipments subject to competition, no skill or science was required in making rates; that rates were forced on carriers by their competitors, regardless of what they ought to be."

Such being so, they are not evidence of their justness. It is absurd to testify that they are reasonable when they were forced to make them.

The opinion is full of incongruities, but space forbids further reciting.

We therefore conclude that the numerous arguments, based upon the findings of the court as conflicting with those of the Commission, are unsound.

III.

RATES ON LIVE STOCK AND ITS PRODUCTS MUST BE COMMERCIALLY FAIR TO BE REASONABLE PER SE OR RELATIVELY, AND CAN NOT BE BASED ON THE COST OF TRANSPORTING OR PROFITS RELATIVELY PER 100 POUNDS, OR PER CAR.

Chicago is the better market, because it has the more buyers; it has the more buyers because the rate adjustment gives them an equal show with the packer to ship to consuming points to the East.

Kansas City and Omaha can never induce cattle to move there equally with Chicago from the Iowa corn belt, unless the rates on live stock give the buyer at Missouri River for shipment on the

hoof a commercial equality with the shipper of the meats from Missouri River and the shippers of the live stock from Chicago. Therefore, the very thing which the stock yards companies are asking for at the Missouri River points will keep Chicago in the lead, unless the relation of the rates eastbound from Chicago are likewise made to give a preference to the packers, and to subject live stock shipments to a like prejudice and disadvantage.

If 70 per cent of cattle in the 23½-cent zone goes to Chicago, which is not true of hogs, it is the competitive buying there of those shipping cattle on the hoof from Chicago. If buyers could do that at Missouri River, they would, but they can not because the rates are too high, except for cattle from west of the Missouri River. The relative adjustment of the rates on shipments from the 23½-cent zone is beyond doubt a disadvantage to the shippers, for it deprives them of competition to the extent of the difference in cost of shipping the animal compared to its product.

The decision of the Commission is in behalf of the *traffic and shippers of it*. It states in its opinion that rates relatively just should be established, and then let the traffic move as it will. (Record, p. 45.)

The Order of the Interstate Commerce Commission in this Case does not Require that the Rates upon Live Stock shall be the Same as upon Dressed Meat and Packing-House Products; they may be made Higher upon the Latter.

The order prohibits the rates being higher upon the live stock than upon the product of the live

stock. The rates being the same on both meats and so-called packing-house products, the Commission's order applies alike to both; indeed, they are treated as an output under the name "products."

At the argument the question was asked from the bench whether there would not remain a discrimination, preference, or advantage even if the rates were made the same. The answer to that must be in the affirmative, but the question as to whether or not such preference, advantage, or discrimination if the rates were the same would be *undue* or *unreasonable* is not a question involved in the case to enforce the order, as the Commission did not go further than to hold it *unjust*, at least to the extent of the *difference*.

Under the order of the Commission, of course the carriers could make the rates higher upon the meats and products than upon the live stock.

The Commission went no further than to order that the prejudice and disadvantage against the traffic in live cattle and hogs *by maintaining the higher rates* upon them, than upon the products of cattle and hogs, be removed.

The Commission did not attempt to place them upon a commercial parity, for to do so would have required an adjustment of the rates considerably higher per hundred pounds upon the prepared product than upon the live stock.

If the court should be of the opinon that a discrimination exists and that while the order of the Commission prevents it to the extent of the difference between the rates upon the live stock and the products of live stock, but that in order to remove the unlawful discrimination the rates

should be so adjusted as to place the live stock upon a commercial parity with its product when shipped to the Chicago market, then the court has the power under section 3 of the Elkins Act to reverse the decision of the lower court and to direct court by virtue of the Elkins Act to require a discontinuance of such discrimination by any "proper order, writ, or process," as provided by section 3 of said act.

The existence of the packing houses on Missouri River or at interior points does not depend on the present commercial relation of these rates, which is indisputably proven by the fact that they get their supplies of live stock mostly from west of the river, and when it reaches Missouri River it may move on to Chicago for an additional 16 cents per 100 pounds generally as a balance of the rate.

The Commission intimates an opinion that the product rates should be higher than the live-stock rates, and the testimony sustains this opinion.

The following extracts from the testimony of Mr. Peabody and Mr. Tomlinson reflect the opinions of a number of witnesses and the relative rate adjustment everywhere else except eastbound from these particular localities to Chicago, and show the proper relation.

Mr. Peabody testified:

"My conviction, based on a good many years' experience, is that the raw product in any case should be carried less than the finished product, and in a case like the dressed meat, which is a highly finished and perishable product, the rates should be at least 50 per cent higher than the rate on cattle. On packing-house products it should be perhaps 20 or 25 per cent higher. In other words, if I was to make the rates as made on the

basis of to-day, allowing cattle at 23½ cents, I should put the packing-house products at 28½ cents and the dressed meats at 33½ cents."

(James Peabody, R., 1351.)

Mr. Tomlinson testifies:

"Q. State what rates on live stock and its products would place the shipper of the live stock and the shipper of the product of live stock on a commercial equality in the markets of Chicago and the other points where they come in competition.

"A. As between cattle, for example, and the product of cattle known as finished beef, the product rate should be about 175 per cent of the cattle rate to place the shipper of cattle on an equality with the shipper of beef."

(Tomlinson, R., 1547.)

Mr. Tomlinson was a man of a lifetime experience as an expert in matters pertaining particularly to the rates and the movement of the traffic and the commerce of live stock and the fresh meats and packing-house products; likewise an expert upon railway transportation matters. He gave his testimony before the court in a clear and lucid manner, with a thoroughly intelligent presentation of facts, statistics, comparisons of statistical data, and calculations, tables of exhibits, and the like, so as to demonstrate the accuracy of his conclusion. It would serve no useful purpose to copy his evidence, neither can it be intelligently excerpted. We therefore refer the court to that evidence as thoroughly supporting and convincingly proving every fact found by the Commission and that its ultimate conclusions were correct. (Record, 1740–1765, 1873–1891.)

We assert it as an incontrovertible proposition that if the difference in cost of the transportation of the live stock and the dressed meats and packing-house products

does not justify a lower rate of freight upon the latter, then an opinion of a witness that the rates should be lower upon those commodities because of the difference in the cost of service, is worthless as evidence; and that the number of witnesses expressing such opinion upon that ground adds nothing to the value of such an opinion.

Mr. Severance's analysis of the testimony filed with his brief of argument herein deals principally with questions relating to the reasonableness of the rates and the proper relation of the rates almost wholly from the standpoint of the cost of the service relatively on the dressed-meat and packing-house products on the one part and the live animals upon the other, and the profits relatively per carload or per 100 pounds to the carrier.

Having shown, as we believe, that the proper relation of rates between competing commodities can not be determined upon that basis, it would unduly tax the patience of this court to review to any extent the evidence in opposition to that quoted in Mr. Severance's analysis.

But the statements of Mr. Stickney and a few others are so completely at variance with the actualities as to the cost of carrying live stock that we feel that, lest we should be considered as admitting the correctness of those statements, we should point to some of the evidence which refutes the same.

But before doing this we call attention to the statement of Mr. Baxter, page 44 of his brief, to the effect that the relative cost of transportation is only of consequence in so far as the theory of the relative adjustment of rates upon the basis of the cost of the service coincides with the adjustment, which, it is claimed, resulted from competition.

While the reduction in the packing-house product and dressed-meat rates to the point now charged results from competition, there was no competition which would prevent a like reduction in the live-stock rates. Hence, *the relation of the rates is not in fact the result of competition.* But the defense is placed upon that basis, as is the decision of the circuit court.

The opinions of the numerous witnesses for the railway companies that the rates should be higher upon the live stock than upon the packing-house products and dressed meats, wherever such opinion was expressed, it will be found were based entirely upon the relative cost of the service which such witnesses claimed to exist. In no case did a single witness express the opinion that there was any theory of rate making aside from the relative cost of service that would justify the making of rates relatively higher per hundred pounds on live animals than upon dressed meats and packing-house products, and no one except Mr. Stickney claimed that to be a correct theory, and he admitted it to be impractical.

Besides, the admitted practice of the carriers throughout the country to make the rates higher upon the dressed meats and packing-house products than on the live stock is the strongest expression of opinion possible in support of the proposition that it ought to be so.

Even considering the cost of the service as the material and controlling factor, witnesses, as railway officials having long experience in railway traffic matters, testified before the Commission, and their evidence was introduced before the court, to the effect that the rates should be higher upon

the dressed meat and packing-house products than upon the live stock because the cost is greater upon the former. In support of this statement we point to the testimony of Mr. W. B. Biddle, then freight traffic manager of the Atchison, Topeka and Santa Fe Railway Company and now the third vice-president in charge of traffic of the Chicago, Rock Island and Pacific Railway Company (Record, p. 1505); Mr. Darius Miller, then and now vice-president in charge of traffic of the Chicago, Burlington and Quincy Railroad Company; Mr. Delano, the general manager of the same company (record, p. 1703); and Mr. Boyd, the general freight agent of the Chicago, Rock Island and Pacific Railway Company (record, p. 1717); Mr. Johnson, (record, p. 1727.) The opposite opinions are presented to the court by other officials of the same roads.

Some of these witnesses, particularly Mr. Miller, went into the subject of the relative cost of service in a detailed calculation, which proves that the profits per carload resulting from the transportation of dressed meats and packing-house products as an average from Missouri River points to Chicago was far less than the profits in transporting the live cattle and hogs. We deem it unnecessary to copy that testimony here, but point to the record for a painstaking review of the actualities in that transportation. (Record, 1487, et seq.)

There was also introduced in evidence the testimony of Mr. Bird, the vice-president in charge of traffic of the Chicago, Milwaukee and St. Paul Railway, who testified before the Commission that theoretically the rates ought to be higher upon the dressed meats and packing-house products than

upon the live animals, though he claimed in this case that because of the competition which reduces the rates on dressed meats and packing-house products, and because of the relative cost of the service, being greater as he thought on the meat and products, and because the rates on both were too low to be reasonable, that that theory should not be given application in this case. (See record, p. 2001–2002.)

Mr. E. P. Ripley, the president of the Santa Fe Railway Company, and Mr. Peabody, the statistician of that company, both testified at the hearing before the court that both in theory and from the standpoint of the relative cost of the service that dressed meats and packing-house products should take a much higher rate per hundred pounds than live stock.

It has been pointed out in the appellees brief that both of these witnesses claimed that the rates upon the live stock were too low, but an examination of that testimony will disclose the fact that this contention was based upon the cost of the carriage and the profits to the carriers, which, as we have shown, can not be made the basis of relative reasonableness of rates on particular commodities, because those rates can not be made to produce any particular equivalent profit, although they should be so made so as to produce some remuneration above the mere cost of the haul, which is admitted.

An analysis of Mr. Peabody's figures, upon which Mr. Ripley testified by which he reaches the conclusion that the live-stock rates are too low, involves the error which does not apply to the relation of the rates, but destroys the value of his

computation upon the reasonableness of the live-stock rates, in this; he measures the live stock and meat rates by the *average cost for all business*, and he ascertains the cost of the service, not from the *actual cost of hauling live stock*, but by the *average cost per gross ton mile of moving all of the freight and the cars, loaded and empty, of the railway company;* and thus, by taking the gross ton miles and dividing that into the total operating expenses of the railroad, he arrives at the so-called cost per gross ton mile. Using that as a basis by which to multiply the gross ton miles of hauling live stock *and the return of the empty car* to the point of origin, he concludes that it costs so much per gross ton mile to haul every car of live stock. This basis is necessarily a mere theory, which is, at most, valuable only for purposes of theoretical comparisons, and to apply it as a prime factor in determining what *rates ought to be* would reduce the proposition of rate making wholly to a per ton mile basis and eliminate every practical element. Indeed, a gross ton mile basis, which no one has ever, at any time, contended for. As a theory of comparison his calculations are not correct, because, according to the testimony of a number of witnesses as to the weight of bedding in the cars, being 500 to 1,000 pounds, he estimates that entirely too high. He assumes too great a weight for the car and that the car which brings cattle from Kansas City to Chicago will return empty in all cases (whereas 20 per cent return loaded), and charges that against the freight paid upon the cattle, upon the theory that it costs as much according to the weight of the empty car to return it than it does to haul the same weight in a loaded

car. It may be conceded that this is true so far as the actual expense of coupling an engine onto a train of cars and hauling that train a given distance. The consumption of coal, the compensation paid to the train crews and enginemen, in such a supposed case would be practically the same thing in proportion to the weight. But it must of necessity be true that in the multitude of a railway company's business the haul of empty cars is so interspersed with the trains of freight moving in both directions that, for the most part, the empty cars are moved in trains which also carry freight or which it is necessary to move from one division to another, oftentimes for the purpose of hauling freight in the opposite direction. The train crews, the locomotives, and cabooses have to be moved at some regular intervals whether there is a full train load of freight to carry or not, and it therefore must result that only partial train loads can be had in many instances. This is proven to be true in the course of examination and cross-examination of a number of witnesses. But really it needs no proof aside from the fact that the statistical tables taken from the annual reports of the various railroad companies show that the average number of cars per train and the average tonnage hauled per train mile is so much below the capacity of the locomotives, and indeed so much below the average train loading in this live-stock traffic, that these statistics themselves prove incontestably that many trains must move light—that is to say, without a full load—in one direction in order that the crews and locomotives may return with freight from the other direction. Another thing is that the railroad companies must provide a suf-

ficient number of locomotives, cars, enginemen, and train crews to handle their business over given divisions moving in both directions and to a large extent must run their trains somewhat on schedule, and it will always happen that the application of system to the handling of the business will result in running trains light, and therefore the railroad company will be afforded the opportunity to return the empty cars in trains which otherwise will run light, and that without any appreciable difference in the cost to the railroad company for the movement of the empty cars. This would not be true if the empty cars had to be returned at a particular speed or at a particular time, as is the case with refrigerator cars, as shown by the testimony of Mr. Miller, Mr. Biddle, and others, and as found by the Commission, and not disputed by the court.

The great bulk of the live stock arrives at Chicago on Mondays and Wednesdays. Those shipments are made from Iowa points by loading on Saturdays and Sundays for the Monday market and on Monday or Tuesday for the Wednesday market. If we suppose the same cars to be continuously used in this service then the railway companies have, from the unloading on Monday, time to return those cars to Iowa points for the next Saturday or Sunday's loading and then from the unloading of Wednesdays to return their cars to the points of origin for a return loading on the following Monday or Tuesday. In other words, they have a week in which to use these cars over and over again if they in fact carry them back in the manner they claim for that purpose. Mr. Gardner claims an average of 50 miles per day for stock cars, refrigerators about the same, and box cars 30 miles per

day (record, 360). During that week it is manifest that many trains will move without a full load in that direction, and these stock cars can wait the opportu ity to be sent out in such trains as have not a full load. Undoubtedly this is done. As fully illustrating this, see the train consists and samples of conductors' reports. (Record, 1083, 1819, 1797 to 1814, and 905.)

Another thing is that many of the stock cars—the Commission holds 20 per cent—have a return loading, and that is supported by the testimony of a number of witnesses. The movement of live stock itself out of the stock yards is shown by the reports of the stock-yards companies on file with the original record, and as testified to by some of the witnesses shows a large return loading and outbound movement from the markets to the country places in the way of feeders bought and shipped out.

So this important factor of Mr. Peabody's figures is itself untrue, and are important as a comparison only, upon the *theory* of an empty return movement in both cases.

As we have shown in our brief, the earnings upon the rates on live stock in question per ton mile, per car mile, and per train mile exceed the average earnings of all freight per ton mile, per car mile, and per train mile as actually moved, as shown by train, consists of about 25 to 50 per cent.

Another element that is entirely overlooked by the witnesses for the railroad companies in the evidence, with respect to the reasonableness of the rates and the earnings, is that this live stock moves on a *long haul greater than the average of freight, moves in train loads to a large extent in a large and*

constant volume, and hence it is manifestly unfair to undertake to compare it to the average of freight which moves in part in less than carloads, and, when it moves in carloads, does not form train loads gathered up from a particular district, but involves a multitude of transactions to assemble a train load of the average of freight.

Therefore the repeated opinions of railway traffic men that the live-stock rates are too low are simply the time-serving expressions made to fit the particular case. This was very clearly illustrated by the cross-examination of many of these witnesses, who were asked if they could name any article upon which the rate of freight was too high, and none of them did so. The human nature side of it and the desire to make money for their companies leads to the expression of those opinions, which are well-nigh worthless.

IV.

THE DISSIMILARITY NOT HERE APPLICABLE TO SECTION 3.

That part of the argument of Mr. Baxter, Section XV, pages 44 to 48 of his brief, and his contention that the third section of the act is to have the same application where different descriptions of traffic is involved as where different places are involved is to be answered by the proposition that—

Where by reason of the relation of rates charged by a railroad upon two competing articles of traffic, like live stock and its product, one is given undue preference or advantage and the other is subjected to unreasonable prejudice or disadvantage, it is prohibited by the third section of the act, whether the competing commodities are shipped from the same station to the same destination or from different stations to different destinations; in

such a case it is not a condition of the third section that the shipment must be from the same station and for the same identical service before there can be a violation of the law. Identity of service and circumstances is applicable only to sections 2 and 4.

To illustrate, suppose a single flouring mill exists on a line of railroad, with no competing mill within 20 miles on either side and that there are stations every 5 or 10 miles from which wheat is shipped, and suppose that the railroad company should fix a rate of 5 cents per hundred pounds on flour less than on wheat from all the stations including the one at the mill; and suppose that the result would prevent the shipment of the wheat by giving to the shipper of the flour a 5 cents per hundred pounds advantage at the point of consumption, can it be said that such preference or prejudice, if it is undue or unreasonable, is not prohibited except as to shipments from the station where the mill is situated?

The case at bar goes even further than the supposed case presented, because it is conclusively shown as found by the Commission that the published rate from Missouri River is a basing rate for the rates in the zone 150 miles east of the Missouri River, while in the supposed case the rates are not based on the milling station. It would be quite immaterial whether there is from every station east of the Missouri River a published rate on dressed meat and packing-house products, from which stations no such product is shipped. Does the fact that there is no published rate from the stations east of the river, from which shipments of product are not made, affect the question as to the undue preference and advantage or unreasonable prejudice and

disadvantage arising from the rates at the river on product and from the intermediate stations on live stock?

Compulsion by Competition no Defense—The Relation of the Rates in Effect Agreed on.

Mr. Baxter quotes, at page 69 of his brief, from the decision of this court in the Nashville and Chattanooga case (181, U. S.) this language:

"A discrimination springing alone from a disparity in rates can not be held in legal effect to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of undue or unreasonable preference or advantage will not *apply*."

The context shows that it had reference to a case where, in the first instance, the issue was as to a violation of the fourth section and where the third section was appealed to secondarily; that is to say, if the lesser charge for the longer than for the shorter haul was not a violation of the fourth section, it might be a violation of the third section.

This court merely held that such could not be the case, because the third section would not in such case *apply*. It was not held that where the third section *applies*, the fact that competition caused the making of the lower rate that produced the preference and prejudice would render it lawful, if under all the circumstances it was undue and unreasonable. In such case it is a question to be determined by the facts.

We can not conceive that the law which prohibits an undue preference and unreasonable prejudice and disadvantage will justify the carrier to con-

tinue that prejudice and disadvantage by the maintenance of the higher rate on the competing article, merely because it would be to the carrier's business advantage to do so. That would make the motive to make money a justification for violation of the law.

It may be as claimed that the carriers can not relieve against the undue preference and abolish the unreasonable prejudice and disadvantage, *except by a reduction of the live-stock rate;* and it may be that the competition for the dressed meat and packing-house products has brought down the rates on those articles. If so, and if in justice to the shipper of live stock, because of this disadvantage, the railways ought not to charge more upon live stock than on dressed meat and packing-house products, which can only be brought about by reducing the live-stock rates, is it not likewise one of the consequences of the competition that the railroad should be required to reduce the rates on live stock so as to avoid the discrimination against the shippers of it, if the carrier prefers to reduce the rates upon the products rather than do without that business? Any other solution of the case necessarily means that the packers who get the lower rates and the preference can justify it solely upon the ground that they get it; and it may be repeatedly done with no possible relief, because the doing of the thing justifies it.

The universal principle of the law that everyone must abide the consequences of his act certainly applies with full force to the Chicago Great Western Railway, as it was recognized by Mr. Stickney in his famous letter to his stockholders upon this subject, occurring in the record at pages 1911 to

1916 and liberally quoted from in the analysis of facts filed by Mr. Severance, solicitor of that railway.

It is further shown by that document that these railway companies met and discussed this whole question. He says, at page 1913, after reviewing the history of the matters leading up to the contract, including the rates and rebates, that—

"Under these conditions the railway companies met in their traffic association to determine upon the rates which they would publish in their tariffs and thereafter collect. The statement and proposition of the packers were known to them."

In view of this it is rather singular that the court, if we may be permitted to say so, went somewhat out of its way to find in its fifth finding "That the competition in question did not result from the agreement of the defendants, but was actual and genuine," whatever that finding may mean.

The important point is that the *relation of the rates were agreed upon, and therefore were not the result of that sort of competition*, which shall bear upon their lawfulness under the fifth section.

By reference to the record, page 966, it will be seen that the complainant offered to prove before the court that the relation of these rates and the tariffs in effect which were complained of, were in fact the result of a combination or agreement of the defendants through their traffic association.

Mr. H. R. McCullough, vice-president of the Chicago and Northwestern Railway, was interrogated upon this subject and the evidence rejected by the court, as shown in the following excerpt (Record, p. 966):

"Mr. COWAN. I want to know if it is not a fact that when you published and have since maintained, if you have maintained, the present schedules of rates on packing-house products and dressed meats, you in effect established an advance over what you were getting from the packers theretofore for the haul?

"Mr. LYNDE. I wish to object to that question.

"The COURT. The objection is overruled. Of course, the court has a right to know whether it advanced it in fact. The schedule rate does not amount to anything if it is not charged. I think it is important to the court to know whether they advanced the rate or cut it down.

"Mr. LYNDE. Is that the question, whether the rate was advanced or cut down?

"The COURT. The published rates cut no figure if they do not receive pay according to their schedule. Now, repeat the question and let him answer.

(Question read by the reporter—the question beginning, "I want to know if it is not a fact," etc.)

"A. Previous to the date of the Great Western contract—previous to the date their reduced tariff was issued from South Omaha, there was more or less misunderstanding and demoralization in the rates on dressed beef and packing-house products from South Omaha and over our road, without discrimination as between persons or localities—we did move some dressed beef and packing-house products destined for export, and sent to foreign countries at rates different from the rates shown in our printed tariff. What those rates were I, of course, can not say.

"The COURT. I think that answers it.

"Q. (Mr. COWAN.) Is it not true that the railway companies met in their traffic association to determine upon the rates which they would publish in their tariffs and thereafter collect?

"Mr. LYNDE. That is objected to as not redirect examination.

"The COURT. How is that material, Mr. Cowan?

"Mr. COWAN. It is material to show that instead of the rate being, if your honor please, forced upon all the railroads by the Great Western contract, that it was an agreed rate that they put in as settling a previously disturbed condition of rates when they had all been hauling for less than the amount of the Great Western contract.

"The COURT. Well, what difference would that make? The question here is: Is this a discrimination again—traffic or locations? The objection is sustained.

"Q. Mr. COWAN. With respect to the *live-stock* rates in the 23½-cent territory and from the Missouri River to Chicago, were the carriers transporting that previously at less than the published rate?

"A. When for export, I think, yes."

And again the witness showed that the rates on cattle were likewise being cut for the benefit of the packers, as shown on page 967:

"Q. Who was exporting?

"A. Well, that is a general statement of mine; of course, it is so far back that I could not exactly recollect.

"Q. The packers principally exported?

"A. My recollection is that during this demoralization in rates on dressed beef and packing-house products, especially for export, that there was some misunderstanding about rates on cattle, and there were some cattle moved, I think, at rates different from the printed tariffs. When that was done, or to what extent, of course, I can not tell.

"Q. That was only from the Missouri River?

"A. Only from the Missouri River.

"Q. That never applied from intermediate territory?

"A. I don't think it did; no, sir."

It appears from the foregoing that the situation was that certain packers who profit by a contract get an advantage from particular localities, mainly the places at which they have their packing houses, over the shipper of live stock whose rates are maintained by a combination of the carriers and based upon the Missouri River published tariff, where both live stock and its product must be shipped east for ultimate consumption, which the railroads seek to justify because they can not help it, except by likewise reducing the live-stock rate.

As the record shows, tens of thousands of cattle are driven into the Missouri River markets from the east thereof, which are necessarily subject to the disadvantage produced by this relation of the rates at Missouri River points, and that the same disadvantage is continued for a distance of 150 miles east of the Missouri River.

To say that it is not an undue preference and advantage to compel the live-stock shipper, as these carriers are doing, to pay the higher rate of freight to reach the points of consumption, and that it is just, fair, or reasonable because the live-stock shipper can not cope with this association of railways, or because he ships from a different station, is absurd. The burden of the higher freight necessarily continues with the live stock till butchered and sold, and the advantage continues with the meat.

If the third section of the act which prohibits the carriers from subjecting any particular description of traffic to an unreasonable prejudice or disadvantage does not reach this sort of case, then it is wholly inoperative. If Congress had intended the section to apply only to the same stations it would have said so.

Much has been said with respect to the reasonableness *per se* of these rates, and, as we have shown, it is not an issue.

If the case were one where the competition is such that should the carriers reduce the live-stock rates the product rates would likewise have to be reduced by some competition beyond their control, then they could not, perhaps, be required to reduce the live-stock rates below what is reasonable per se. But to hold that the doctrine of "duress from competition," as it may be termed, as it was applied in the cases cited (Chattanooga case, LaGrange case, and others), is applicable here, would entirely repeal sec. 3 of the act. It would be equivalent to saying to the carriers: "No matter how much you discriminate against any particular traffic, you can not be required to reduce a rate below what is reasonable. If you contract to maintain the discrimination it is valid." As shown by Mr. Shaver's brief and argument, this court has repeatedly announced that the lower rate must not result in undue preferences or subject traffic to unreasonable prejudice. That is the point for decision here.

Respectfully submitted.

L. A. SHAVER,
Solicitor for the Commission.
S. H. COWAN,
of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE INTERSTATE COMMERCE COMMISSION, appellant,
v.
THE CHICAGO GREAT WESTERN RAILWAY Company et al., appellees.
No. 352.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the appellant in the above-entitled cause, respectfully moves the court to advance the same on the docket for hearing during the present term, for the following reasons:

1. The appellant is a bureau or department of the Government, and the cause is a proceeding in equity under section 16 of the act to regulate commerce, approved February 4, 1887, as amended March 2, 1889, for the enforcement of an order of the appellant against the appellees.

13810—06

2. Appellee, the Chicago Great Western Railway Company, on August 8, 1902, and the other appellees within a short period thereafter, reduced the rates on the prepared products of live stock to Chicago from points west of Chicago, and particularly from St. Paul and the Missouri River points—Sioux City, Omaha, St. Joseph, and Kansas City—without making any corresponding reduction in the rates on the live stock. This changed the preexisting relation which had been for a long time maintained between the rates on the products and the rates on the live stock and the Commission found that the changed relation thus brought about was unlawful. The testimony shows that the result, if not the object, of the changed relation in the rates was to divert to the Missouri River markets shipments of live stock which would otherwise go to Chicago, and thus build up the river markets at the expense of Chicago. The damage thus being done to Chicago interests is irreparable because incapable of accurate measurement or ascertainment, and if the changed relation is, as found by the Commission, unlawful the order of the Commission forbidding it should be speedily enforced, so as to put a stop as soon as practicable to such irreparable damage.

3. The speedy determination of the lawfulness of the changed relation is a matter of public interest affecting the raisers of live stock, the packing houses and stock yards at all the points named above, consumers, and the public generally.

4. The act to regulate commerce, approved February 4, 1887, in section 16, requires the courts to hear and determine cases for the enforcement of orders of the appellant "speedily," and said section of said act as further amended June 29, 1906, provides that cases of this character shall have in this court "priority in hearing and determination over all other causes except criminal causes."

On account of the size of the transcript of the record in the case, it is suggested that if advanced the case may be assigned for hearing immediately after the February recess. This will be satisfactory to counsel on both sides.

HENRY M. HOYT,
Solicitor-General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

No. 352

THE INTERSTATE COMMERCE COMMISSION,
Appellant,
vs.
THE CHICAGO GREAT WESTERN RAILWAY COMPANY et al.,
Appellees,

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT ON THE QUESTION AS TO WHETHER THE SHIPPER OF LIVE-STOCK IS UNDULY PREJUDICED AND UNJUSTLY DISCRIMINATED AGAINST BY THE LOWER RATE ON DRESSED BEEF AND PACKING HOUSE PRODUCTS FROM MISSOURI RIVER POINTS TO CHICAGO THAN THE RATE ON LIVESTOCK; AND WHETHER THE WELFARE OF THE PUBLIC, INCLUDING SHIPPERS, CONSUMERS AND ALL LOCALITIES AND MARKETS, IS MATERIALLY AFFECTED BY THE PRESENT RATES.

The question to be considered in this argument is whether, on the facts shown by this record, the court should find that the shipper of livestock to the Chicago market or to the Missouri River and interior

markets is unduly prejudiced or unjustly discriminated against by the fact that the rate from Missouri River to Chicago on dressed beef and packing house products is less than the rate on livestock from Missouri River points and the intermediate territory to Chicago; and whether there exists any public necessity which demands the enforcement of the Commission's order, and whether its enforcement "is likely on the whole to promote the public advantage."

This question is suggested by the (so-called) concurring opinion of Mr. Chairman Knapp of the Interstate Commerce Commission in this case (see p. 47), where he says:

"While I agree with nearly everything said in the foregoing report and opinion, I feel bound to express my doubt whether the action of the Chicago Great Western did not, as regards the other carriers, introduce a competitive condition which creates or justifies an exception to the general rule. To my mind, the competition brought about by that action is not easily distinguishable in legal effect from the competition which the Supreme Court in various decisions has held a valid excuse for discriminations clamed to be unlawful. *Nor is it altogether clear to me that any order which the Commission has authority to make in this proceeding is likely on the whole to promote the public advantage.*"

While the Chairman of the Commission, therefore, concurred in the findings and conclusions of the Commission, yet, it is apparent that his concurrence was based solely upon the theoretical proposition that a rate adjustment under which a lower rate was charged for the product than for the raw material was "fundamentally wrong" and that to sanction such adjustment would, in his opinion, "establish a dangerous prece-

dent." As a practical question, however, it is apparent that the Chairman of the Commission doubted very seriously whether the order made by the Commission would promote the public welfare, and was also very strongly impressed with the belief that the action of the Chicago Great Western introduced a competitive condition, which, under the decisions of this court, created and justified an exception to the general rule. I shall address myself to the question suggested as to whether the order of the Commission was in fact for the best interests of the public and "likely on the whole to promote the public advantage"; and my contention will be that the record shows that in fact the interests which may be possibly adversely affected by the lower rate on the product than on the livestock are of such minor importance, as compared with the burden that will be put upon these railroads and the loss which they will be compelled to bear by a reduction in livestock rates, that in the general balance which the court will be required to strike in arriving at its judgment in this case (as was suggested by Judge Baxter in oral argument in the court below) they should be disregarded, and that in fact, viewed from a practical standpoint, the general public interests do not require that the order of the Commission be enforced.

On the oral argument in the court below, it was claimed by counsel for the Commission that the parties who were interested in the enforcement of the Commission's order were the shippers of livestock from east and west of the Missouri River, the packers at the Missouri River and intermediate points and at Chicago, the Chicago Stock Yards and the Livestock

Exchange; and that there existed competition which should be taken into consideration at Chicago, in the Eastern markets and elsewhere between the livestock shipper, on the one hand, and the slaughterer or packer on the Missouri River and at intermediate points, and between the live animal and the dressed beef and packing house products; and this same argument is repeated in appellant's brief in this court. (See p. 63 *et seq.*) It is this claim of interest on the part of the shipper in the enforcement of this order and of competition between the shipper of livestock from both west and east of the Missouri River, and the Missouri River and Iowa packers, and of competition between the live animal and dressed beef and its products, which will be the chief subject of consideration in this argument, for the reason that if the shipper is not in fact adversely affected by the lower rate on the product and if in fact there is no competition in the true meaning of that term between the shipper of livestock from the western territory and the packer on the Missouri River and at intermediate points, then it is apparent that the only interests that could possibly be adversely affected would be the local interests of the Chicago Stock Yards and the Livestock Exchange, and the possible effect upon them is shown to be so slight that the court would not be justified in making an order which would throw so heavy a burden and put so heavy a loss upon these railroads, and which would tend to injuriously affect the local interests in Iowa, at St. Paul and at the Missouri River markets. In other words, if the shipper of livestock is not in fact prejudiced by the lower rate on the product, and is eliminated from consideration, the remaining

interests, claimed to be affected, are of such minor importance, and the claim asserted on their behalf of being prejudiced is of such doubtful merit, that the enforcement of the Commission's order would not tend to promote the public advantage.

I.

THE LIVESTOCK RATES, WHICH ARE THE SUBJECT OF THE COMMISSION'S ORDER AND WHICH MUST BE REDUCED UNDER EXISTING CONDITIONS IN ORDER TO COMPLY WITH THAT ORDER, ARE CONCLUSIVELY SHOWN BY THE OVERWHELMING WEIGHT OF THE EVIDENCE TO BE NOT ONLY REASONABLY LOW BUT TOO LOW, AND, THEREFORE, SO FAR AS CONCERNS THE LIVESTOCK SHIPPER, THE COURT SHOULD NOT MAKE ANY ORDER WHICH WOULD REQUIRE THE REDUCTION OF THESE LIVESTOCK RATES BECAUSE OF THE LOWER RATE ON THE PRODUCT, UNLESS THE LIVESTOCK SHIPPER IS IN FACT UNDULY PREJUDICED OR UNJUSTLY DISCRIMINATED AGAINST BY THE LOWER RATE ON THE PRODUCT.

A fundamental proposition of this argument is that the livestock rates, which will be affected by an enforcement of the Commission's order, are in themselves reasonable, if not unreasonably low, and that this is shown conclusively by the evidence in this case; so that the shipper of livestock, who pays these rates, could not claim that the order of the Commission (which will, if enforced, compel a reduction in these livestock rates), should be enforced because of these rates being unreasonable, and the court can not, on the evidence before it, find these rates to be unreason-

able. Therefore, unless the shipper of livestock is in fact unduly prejudiced or unjustly discriminated against by the lower rate on the product, he should be eliminated from consideration in this case, even though a reduction in the livestock rates in question would be of material advantage to him. That advantage is one which he is not entitled to, if the livestock rates are in themselves reasonable; and, if so, the only question which the court should consider, with respect to the livestock shipper, is whether he suffers in fact any prejudice or disadvantage and sustains any actual injury because of the lower rate on the product.

The livestock rates which are directly affected by the order of the Commission are those rates from intermediate points in the western part of Iowa and Missouri, and from certain portions of southeastern and eastern Minnesota and the northwestern part of Wisconsin; and the inquiry here is limited to the livestock rates from these intermediate points. This arises from the fact that practically all the livestock which is carried easterly from the Missouri River is carried on the through rate from the point of origin west of the Missoui River, and there are practically no shipments made from the Missouri River to Chicago on the 23½ cent local rate, which is a basing rate applied at intermediate points east of the Missouri River. This is very clearly shown by the evidence, and was also found by the Commission, and they say as to it, on page 35:

"Since all or nearly all the livestock carried easterly from the Missouri River is shipped there in the first instance from other points, practically no shipments are made from the river to Chicago upon the local rates in force between those points, and such rates are, therefore, important, principally, because of their effect upon rates from the intermediate points."

This makes it unnecessary to consider rates from points west of the Missouri River to Chicago, and limits the inquiry to the reasonableness of the live-stock rates from intermediate points east of the Missouri River and east of St. Paul to Chicago. The evidence in this record that these rates are not only reasonably low, but, if anything, unreasonably low, is overwhelming and cannot be successfully challenged. This fact is established quite as much by the testimony of the witnesses offered by the complainant as by the testimony of the witnesses called by the respondents. It is significant, also, in this connection, that the Commission did not feel justified in finding these rates unreasonable, and say (p. 41) as to this:

"Complainant also introduced considerable evidence tending to show that the rates exacted by defendants for transporting livestock to Chicago from points in the States of Iowa, Missouri, Wisconsin and Minnesota are unreasonable *per se*, but the testimony upon that point is unsatisfactory, and we do not feel justified in making a finding in relation thereto."

This statement is very significant for the reason that the evidence introduced by the complainant before the Commission upon this point consisted of the testimony of Mr. Tomlinson with the same tables and comparisons of rates which he used on the hearing in the court below. The Commission did not feel warranted on that evidence in finding these rates to be unreasonable, and the court below expressly found that these rates were reasonable.

In view of the fact that the appellant has challenged this finding by its fourth assignment of errors (181), I will briefly state the evidence, on which this finding is based.

On the hearing before the Commission, the petitioner called as its witnesses the officials of certain railroads, Darius Miller, First Vice President of the C., B. & Q. Ry. Co., W. B. Biddle, then Traffic Manager of the Santa Fe Company, Burton Johnson, Traffic Manager of the Wisconsin Central Railway Company, and ..... Boyd, then Freight Traffic Agent of the C., R. I. & P. Ry. Co., and the complainant read in evidence their testimony before the Commission. Mr. Miller testified (1492) on the question as to whether the 23½ cent rate on livestock was reasonable or not, as follows:

"I think it is an exceedingly low rate. It is relatively lower than any other commodity we handle except packing house products."

See, also, clauses 14 and 15 of his additional statement made to the Commission in writing (1503), in which he says:

"I stated that our rates on livestock are relatively lower than our rates on any other commodity, except livestock products, and, if it is my privilege to do so, I wish to supplement that statement by saying that it is our desire to so adjust the livestock rates as to put them in proper relation to the rates which are charged for the transportation of other commodities, and, having accomplished this, we would establish the rates on the different kinds of livestock products in their proper relation to the rates on livestock, but if we are prevented from making a proper adjustment of these rates by the action of a competitor who established and guarantees, for a stated term, rates on the product of livestock, which rates are of themselves unreasonably low and out of proportion with the rates charged on other kinds of freight, we do not for that reason conceive it to be our duty to make abnormally low rates on livestock or other kinds of freight on which we may be charging relatively higher rates but which are of themselves just and reasonable."

Burton Johnson says (1734), that rates on livestock, as well as product, were lower "than a compensatory basis."

(NOTE.—Neither Boyd nor Biddle were examined on the question of the reasonableness of the livestock rates.)

To emphasize Mr. Miller's testimony on this point, counsel for appellant called Mr. Ripley, president of the Santa Fe, and Mr. Peabody of that company, and demonstrated to the best of their ability by these witnesses that both rates on livestock and on the product are not compensatory and are unreasonably low. Mr. Ripley says (1106, 1107), that the railroads "*lose* less on livestock than on packing house products;" and the statements which he produced and which were introduced in evidence by complainant (1104, 1105) demonstrate a loss on both livestock and products, the loss being, as he claims, greater on the latter than the former. If these statements are to be accepted for the purposes for which they were introduced by appellant (and appellant cannot well question them), they certainly demonstrate the proposition that the rates on livestock are not compensatory and are unreasonably low.

Mr. Peabody is even more emphatic on this point, his testimony being (1233), that livestock "falls a little short of paying even the operating cost;" that from Kansas City to Chicago it lacks $18.77 per car of paying the total transportation cost; and (1362, 1363), that the cattle rate and the product rates are too low and that the 23½c rate is below the total transportation cost.

(NOTE.—The statement prepared by Peabody and

introduced in evidence by complainants were made on the basis of a 20c rate; but Mr. Peabody here makes an estimate on the basis of 23½c, and reaches the result above stated.)

The defendants' witnesses, who testified to the reasonableness of these livestock rates, were traffic men of large experience and ability and competent, if any one, to pass judgment on this question. Their opinions were supported by comparative statements showing comparison of these livestock rates with rates on other commodities, and with other livestock rates and of the revenue derived from livestock with the revenue derived from other commodities. It would be beyond the scope of this argument to attempt to give in detail the substance of their testimony, and I will limit myself to a mere reference to the pages of the record on which the testimony of these witnesses bearing upon this question will be found.

Mr. Crosby, traffic manager, C., B. & Q. Ry. Co. (238): These rates are fair and reasonable, considering service performed and conditions of competition under which they are made; less than on other traffic for similar distances. See, also, 241-243, as to comparison with rates elsewhere and of revenue derived from livestock compared with revenue from other commodities.

W. E. Keepers, general freight agent, Ill. Cent. R. R. Co. (399): Rates unreasonably low and do not yield fair compensation for service. See, also, 400-406 as to comparison of revenue derived from livestock with that derived from other commodities.

J. H. Hiland, third vice president and traffic man-

ager of C., M. & St. P. Ry. Co. (506): Livestock rates do not bear just proportion in contribution to total revenue and are not unreasonably high.

J. N. Tittemore, freight traffic manager, M. & St. L. Ry. Co. (569): These rates are more than just to shipper and less than carrier should receive for the service (572); are the result of competition. See, also, 574, 577, as to comparison with rates on other commodities and of revenue derived from livestock compared with revenue derived from other commodities.

A. B. Stickney, president, Chicago Great Western Ry. Co. (623): Livestock rates are too low.

H. Gower, general freight agent, C., R. I. & P. Ry. Co. (720): These livestock rates are unreasonably low, and forced by competition. See, also, 724, 725.

(NOTE.—See, also, testimony of Mr. Anderson, Judge Baxter's secretary, as to comparison with cattle rates on southern roads, 914 *et seq.*)

H. R. McCullough, third vice president, C. & N. W. Ry. Co. (His entire testimony and the statements which he filed as exhibits, shows that these rates are too low, and have been forced by competition. Note, 951, 952.)

The only evidence introduced by complainant to show that these rates are unreasonable was the testimony of Mr. Tomlinson that, in his opinion, they are unreasonably high, because they are higher than the Illinois or Iowa distance tariffs, and, as he claims, on the average, higher than rates prevailing from Kansas points into Kansas City. Mr. Tomlinson produced certain comparisons of rates from Iowa points in this territory to Chicago on different roads, including the Chicago & North-Western Railway Company, with

rates for similar distances in Wisconsin and with rates fixed by the Iowa and Illinois Commissioner's distance tariffs, with rates in the Central Traffic Association territory and certain rates into Kansas City on the Rock Island and Union Pacific; but so far as his testimony is concerned and the statements of comparative rates submitted by him, it is sufficient to say that this constituted the testimony before the Commission on which they did not feel justified in finding that these livestock rates were unreasonably high. All of the witnesses agree that the Illinois and Iowa distance tariffs do not form fair bases of comparison, because they are too low, and Mr. Tomlinson testified before the Commission that he did not think the tariffs in the Central Freight Association territory could fairly be compared with tariffs in the territory in question. His comparison between Iowa rates and Wisconsin rates is admittedly unfair because the Wisconsin rates are based on mileage to Milwaukee and not to Chicago; and the statement of rates into Kansas City on the Rock Island and Union Pacific will show for itself that on an average those rates are higher than the Iowa rates. They certainly form no proper basis of comparison without some information being furnished as to the conditions that have led to the making of these rates.

In addition to Mr. Tomlinson, we have the opinions given by certain shippers that these rates are too high, as Ames (1284), who claims that they are unreasonably high when compared with rates on like products from like points, and are higher than Illinois or Nebraska rates; but with the exception of the Illinois

and Iowa distance tariffs his statement is not correct, and as to the Nebraska rates the tariffs themselves show to the contrary.

John McCarthy (1430) also claims that the 23½c rate is unreasonable "compared with other rates" or, as he adds, with rates on dressed product.

H. L. Wilson (1047), thinks this too high "compared with rate on similar freight from Chicago to the east," which, of course, furnishes no possible comparison in this western territory.

The evidence, as a whole, clearly demonstrates that the present livestock rates from intermediate points in Iowa east of the Missouri river to Chicago are not in themselves unreasonable, but are, if anything, too low; so that the finding of the Circuit Court that these livestock rates are reasonable is fully sustained.

As the shipper is not entitled to the advantage of a reduction in his livestock rates unless they are unreasonable, the fact that a reduction in these rates would be of advantage to him should not be considered, and the sole question as to the shipper on this record is whether he is unduly prejudiced and sustains an injury because the rate on the product is lower than the rate on livestock.

II.

THE SHIPPERS OF LIVESTOCK ARE NOT PREJUDICED OR INJURED BY THE RATE ON DRESSED BEEF AND PACKING HOUSE PRODUCTS FROM MISSOURI RIVER AND INTERMEDIATE POINTS TO CHICAGO. LIVESTOCK PRICES IN THE WESTERN MARKETS ARE CONTROLLED BY THE PRICES AT THE CHICAGO MARKET, AND THE PRODUCT RATE HAS NOT AFFECTED OR TENDED TO LOWER THE CHICAGO LIVESTOCK PRICES.

The only way in which the shippers of livestock can be prejudiced or injured by the product rate must be in the lowering of the prices for livestock in the Chicago and more western markets. If livestock prices have not been affected by the product rate, and if the shippers of livestock receive as good prices as before the reduction of the product rate from Missouri River points to Chicago, they have not been injured or prejudiced by the reduction of the product rate. The evidence in this record establishes the following facts, that necessarily involve the conclusion that the livestock shippers have not been prejudiced or injured by the product rate, namely:

(a) That Chicago is the best market for livestock in the country; it is the largest, broadest and most competitive market; and the prices at the Chicago market control the prices at which livestock will sell at the Missouri River and intermediate markets.

(b) That shippers of livestock get relatively the full Chicago prices at Missouri River and intermediate markets, if they prefer to sell there, so that they have

the advantage of the nearby market in addition to the Chicago market and the benefit of Chicago prices in the nearby market.

(c) That Chicago prices, which are the standard for prices at the Missouri River and intermediate markets, have not been lessened or affected by the lower rate on the product from Missouri River points to Chicago; so that prices for livestock at Missouri River and intermediate markets, which are based on the Chicago prices, have not been lessened thereby and whether the shipper sells at Chicago or at the nearby market, the price which he obtains for his livestock is not affected by the product rate.

(d) The shipper cannot be prejudiced by the product rate, if the prices which he gets for his stock have not been lessened because of the product rate. So long as he gets the Chicago prices or their full equivalent, if he sells in the nearby market, and so long as these prices have not been lessened by reason of the product rate he is not prejudiced or affected by it; and the fact that the packer at the Missouri River and intermediate points gets a lower rate on the product does not concern the shipper of livestock any more than he would be concerned in the rate on coal or other commodities.

As to the Chicago market and its control over the prices at Missouri River and intermediate markets.

That the Chicago market for livestock is the best market in this country and, as claimed by the witnesses, in the world, is conceded by all of the witnesses who were examined upon this point. (See testimony of Buell, 1271, 1272; Ames, 1346; McCarthy, 1430; Tomlinson, 1877-1880.)

The reasons for Chicago's predominance as a livestock market, as stated by the witnesses, are that it is the largest market; that it is the most competitive and independent market; that there will be found in this market a large number of independent buyers for export and eastern consumption; and that the demand for cattle for export and eastern markets makes the Chicago market independent and competitive and prevents a monopoly in this market. The witnesses claim that the prices at the Chicago market are governed by the supply and demand at that market, and that the very large independent demand at that market, represented by the buyers for shipment to eastern markets or abroad, makes it a highly competitive market.

See testimony of Tomlinson, 1567, where he states as his opinion that the price at Chicago is fixed by the "natural law of supply and demand," and states his doubts of the possibility of a monopoly in the Chicago market because the prices there are "largely dependent on the export demand," and defines the different classes of independent buyers in the Chicago market. See, also, testimony of Baker, Secretary of the Livestock Exchange, who produced a list of the buyers in the Chicago market, and whose testimony accords fully with that of Mr. Tomlinson. (1443 *et seq.*)

All of the witnesses agree that the prices of livestock on the Chicago market practically control the prices of livestock at Missouri River and intermediate markets, and it would seem that this is a self-evident proposition, for the reason that the shippers can at all times ship their livestock directly to the Chicago market and are not compelled in any way to sell at the Missouri River

or intermediate markets. The result of this necessarily is that unless the shippers can get relatively as much for their livestock in the nearby market as they can by shipping to Chicago they will not sell in or ship to the nearby market, but will ship directly to Chicago. This forces the buyer at Missouri River or at intermediate points to pay relatively the Chicago prices, if he desires to buy. The difference between the Chicago prices and the prices at Missouri River and intermediate markets is probably not absolutely uniform at all times, because there is a constant variation resulting from the demand, on the one hand, and the supply, on the other, at these various markets; but, speaking generally, and covering a considerable period of time, there can be no question but that the Chicago prices control and fix the prices in these other markets by establishing a minimum price, which the buyer in other markets must pay in order to get the livestock. The evidence, however, shows that the buyer in these other markets, as a rule, has to pay something more than this minimum; so that the shippers of livestock not only get the benefit of Chicago prices in the nearby market, but get relatively more for their livestock there than by shipping to Chicago.

The witness Buell, President of the Livestock Exchange, says (1345) that the prices in Chicago control prices in other markets; (1266) that the market at Fort Worth, Kansas City, St. Louis and at other points is determined by the Chicago market and that the latter is controlling. He claims, it is true, that the product rate forces the shipper to sell at the Missouri River market, and says again that when cattle are shipped

on to Chicago from Kansas City the shipper frequently does not get enough additional price over the price he could get at Kansas City to pay the freight charges, the shrinkage and incidental expenses; and, therefore, is discouraged from shipping to Chicago (1267); but this can only mean that the buyer at Kansas City pays something more relatively than the Chicago prices, so that it is to the advantage of the shipper to sell at the Missouri River market, as he gets more there relatively than by shipping on to Chicago. He illustrated this very well in the case of his 5,000 head of cattle which he shipped to Kansas City and St. Louis, because, as he testified (1271), the net result was better at those points than if the cattle came to Chicago, when he added to the prices which he obtained in those markets the difference in the freight rate and the incidental expenses in bringing the cattle to Chicago.

The testimony of Mr. Baker, Secretary of the Livestock Exchange (1445, 1446), is that a shipper to Kansas City, for example, will sell his livestock in that market because he could not ship on to Chicago and receive as much as he could by selling at Kansas City, though he admits (1454) that the Chicago prices practically control prices at Kansas City, and (1453) that there is no difficulty from day to day in determining at the Missouri River, from the quotations on the Chicago market, as to the prices in that market. The substance, therefore, of his testimony is that it is to the advantage of the shipper to sell in the nearby market, because he gets relatively more for his livestock than he would by shipping it to Chicago, which

can only be interpreted in connection with the remainder of his testimony as meaning that the buyer at Kansas City will pay something more than the minimum fixed by the Chicago price.

Mr. Ames admits (1321) that the shipper can sell or ship to whichever market is to his advantage.

The testimony of the witnesses Wilson, 1058, 1059; Crosby, 247, 248; Koch, 619, 620, and Foster, 645, 647, is also to the effect that the Chicago price controls prices in the Missouri River and intermediate markets, and that in order to induce livestock to come to the intermediate markets they pay relatively more than the Chicago prices. This is well illustrated, also, by the testimony of the witness Eberhart, connected with the packing establishment at Austin, Minn., as to the prices paid at that point, and the premium which they have to pay to induce the shipment of hogs to their plant. (665, 669.)

Mr. Tomlinson, whose testimony presents the contention of the complainant in the strongest light, says (1567), that there is no uniform difference in prices between Chicago and the Missouri River markets; that the prices average considerably more in Chicago than at these other markets, dependent upon the supply and demand; but that there is no absolute fixed difference between Chicago prices and the prices at these other markets. He states (1584) that the nearness of the market causes stock to move to the Missouri River, and that that is the natural movement of stock from west of the Missouri River; but he claims that the freight rate adjustment is such that the shipper is almost compelled to stop at the Missouri River and sell to the

packer there. He repeats this last statement (1617), and there emphasizes the claim that the adjustment of rates puts the shipper at the mercy of the packer on the Missouri River and at intermediate points, but, in so doing, he makes the very important admission that the packer can afford, because of the rate on his product, to pay the shipper more at the Missouri River and at the intermediate points than the shipper can get at Chicago by shipping his livestock to Chicago.

On cross-examination, however, it is made to appear very clearly by his admissions, that the Chicago prices control the prices at these other markets (1877); that the shipper has the choice between the markets and will sell at Chicago, or at the Missouri River markets, according to whether it will be to his advantage to select the one or the other; that the shipper is not confined in any way to the Missouri River markets, but on the contrary has the benefit of having these markets in addition to the Chicago market, and can always ship to the one or the other, as he thinks for his advantage; and that generally speaking the shipper can get a better price relatively at the Missouri River market, as the packer will give up a portion of what Mr. Tomlinson calls "his advantage" in order to induce the shipper to sell to him at that market. See cross-examination, 1874 to 1881.

The effect of the whole evidence on this point is just the reverse of the contention of the complainant that the shipper of livestock is unduly prejudiced by reason of the lower rate on the product from Missouri River points to Chicago, and that in so far as the product

rate tends to stimulate and develop the Missouri River and intermediate market (if that be the case) it has worked to the distinct advantage of the shipper, in affording him additional markets instead of making him dependent solely upon the Chicago market, in which the prices are practically controlled by the Chicago prices and in which he can generally get relatively a little better price than the Chicago price.

As to the range of prices for livestock on the Chicago market:

There is certainly no evidence in this record that tends in any way to show that the prices for livestock on the Chicago market have been affected in any way by the product rate. On the contrary, the proof is positive and direct that the Chicago prices are fixed by the natural law of supply and demand at Chicago and very largely influenced, if not controlled, by the demand of independent buyers for export and for eastern markets.

So far as concerns the supply of livestock on the Chicago market, Mr. Tomlinson's figures (1559) show that during the last five years the receipts at Chicago have increased 20% in cattle, but have decreased 4% in hogs; and the report of the Union Stock Yards Company for 1904, which is in evidence (but not printed), shows (see p. 45) that the cattle receipts for 1903 and 1904 exceeded the receipts for any previous years subsequent to 1892, which was, according to Mr. Tomlinson, the banner year on the Chicago market. The receipts of hogs have decreased slightly during the last 10 years, but that is readily accounted for by the fact that the natural tendency, as admitted by Mr. Tom-

linson, is for the development of the packing industry near the source of supply, and by the further fact that hogs are more liable to suffer in shipment than cattle; so that they will naturally go to the Missouri River packing houses rather than to Chicago.

As to the demand on the Chicago market for cattle and hogs, it appears from the statement of shipments of stock from Chicago in the report of the Union Stock Yards Company (p. 46), that the shipments of cattle in 1903 and 1904 exceeded all prior years, and that the shipments of hogs for those two years were about the same in amount as they have been since 1897. The shipments must indicate the demand, as these shipments are made mainly to the east, and this report, therefore, would fairly reflect the demand for cattle and hogs in the Chicago market from year to year. No witness asserts that there has been any falling off in the demand on the Chicago market, but on the contrary each witness makes the claim for the Chicago market that there exists on that market a strong competition because of the strong demand of buyers for shipment.

This same report of the Union Stock yards Company gives (p. 59) the range of prices for cattle from 1894 to 1904, and (p. 60) the range of prices for hogs during the same period. These tables certainly do not tend to show that the prices either for cattle or hogs have declined on the Chicago market.

A very significant statement in this report will be found on page 5 and 6, where it says:

"At no time in the history of the business has there been a better prospect of a steady demand for finished

beef cattle of good breeding and quality. The export demand is strong at the close of the heaviest year's shipments since 1890. The demand for shipment to eastern cities has been very active, and such shipments the largest on record. The total shipments of cattle from this market during the year numbered 1,326,322, or over 40 per cent. of the receipts, a total which has not been equaled since the refrigeration era was fairly established. There is now a higher degree of healthy competition among the buying interests on the Chicago cattle market than on any market in recent years, and offerings suited to the demands of the market find ready sale at remunerative prices. It is the unsuitable and ill-prepared consignments that disappoint sellers and buyers alike, for the latter has to meet the demands of his customers, and often experiences as much difficulty in finding an outlet for the product of unsuitable purchases as had the cattle salesman to find a buyer for the live animals."

In the light of the evidence in this record and of all available data on this subject, it is submitted that there is no proof which would tend, in any way, to show that the product rate from Missouri river points to Chicago has in any way affected the livestock prices on the Chicago market. Therefore, it is clear that the product rate has not prejudiced or injured the livestock shipper or producer.

As to the claim made by Mr. Tomlinson and other witnesses for the complainant that the livestock shipper is prejudiced because he is put at disadvantage with and at the mercy of the packer, and forced to sell at the Missouri River market.

Mr. Tomlinson says (1584) that the "freight rate adjustment is such that the shipper is almost compelled to stop at the Missouri river and sell to the packer

there." (See, also, 1617, where he emphasizes this claim and puts the concrete case of Cedar Rapids.)

And, on 1618, he insists that the shipper is "restricted" to the "market nearest him," and, on 1620, that these rates tend to "localize and monopolize the slaughtering business," or, as he again states it, 1622, "to monopolize the business of dealing in livestock to the packers at that point."

These claims are not consistent with the facts, which the witness admits, and which cannot be controverted. The claim that by reason of the product rate the shipper is at the mercy of the Missouri river or intermediate packer, and is forced to sell at the Missouri river or intermediate points, cannot be reconciled with his admissions on cross-examination, that the higher prices at Chicago control prices at the other markets (1877); that the shipper will sell at Kansas City or Omaha, if he can get relatively a better price than at Chicago; and that unless he can get at least as good a price relatively at the Missouri river markets as at Chicago, he will sell there (1880, 1881).

Mr. Tomlinson, in fact, admits (1878, 1879), that the shipper will generally get relatively a better price at the Missouri river market than at Chicago, and intimates this in his claim that the packer to induce him to sell at the Missouri river or at Cedar Rapids (in his illustration) will give up "enough of his advantage" in rates to do so (1617), which can only mean that he will pay more than the Chicago price relatively.

When it is considered, that throughout this intermediate territory the livestock business is of great importance, is prosperous and is increasing from year to

year, and that the Chicago markets are open to all shippers, and the Chicago prices are daily before them, so that, as Mr. Tomlinson admits (1877, 1878), the shippers can and do select their market, and ship to Chicago or to the near-by market, as they consider for their advantage, the claim that the product rate puts them at the mercy of the Missouri river packer is preposterous. Nothing could better illustrate this than the statement of the actual shipments made from all stations on the North Western road for 150 miles east of the Missouri river to South Omaha, Sioux City and Chicago from July 1, 1904, to July 1, 1905, which shows that during this period there were shipped from this 23½ cent zone to Chicago 6117 cars of cattle and 4109 cars of hogs, a total of 10,286 cars, and to South Omaha a total (both cattle and hogs) of 1893 cars, and to Sioux City a total of 1,710 cars (983).

Moreover the evidence shows, that the same shipper will ship part of his cattle to the one market and part to the other, evidently selecting his market with reference to the grade of his cattle, and shipping them where he thinks he can get the best results. And of the shippers who testified as witnesses, most of them ship exclusively to Chicago. Where then is the evidence, that warrants Mr. Tomlinson's claim that the shipper is at the mercy of the Missouri river packer, and forced to sell his stock at the Missouri river, or is "restricted" to the Missouri river markets?

Mr. Buell furnished a concrete example of the fallacy of the contention, by admitting that he sold his 5,000 head at Kansas City and St. Louis, because he could get relatively more for them at those markets

than by coming to Chicago, and the net result was better (1271); and this was true in his case, where he could have shipped on this proportionate rate, as his cattle originated west of the Missouri river. He did not sell there at a sacrifice, but because he could get more for his cattle.

Baker claims (1445, 1446), that the shipper to Kansas City sells there, because he could not ship on to Chicago and receive as much as he could by selling at Kansas City (which amounts to the admission of Buell, that the net result of selling at Kansas City was better than of shipping to Chicago); but in the same breath he asserts that the reason why the shipper could not ship on to Chicago was the difference between the rate on the product and the rate on the livestock. But as long as the shipper can get more relatively for his cattle at Kansas City than at Chicago, he is not going to ship to the latter point; and the product rate has nothing to do with it.

Some of the witnesses speak of the packer as having an "advantage" over the shipper of livestock because of the product rate. Buell, for instance, says (1264), that the difference in the freight rate is an advantage in favor of the slaughterer at Kansas City, and when asked by the court as to why this is not fair, his answer was (1265) that "it looks clear to me that it gives the packer an advantage over the man who wants to ship the livestock."

If this means, that the shipper gets less for his livestock, the statement is not in harmony with his own admissions. The witness probably meant, that the packer by getting a lower rate had an opportunity to make a

larger profit; but this if true, does not prove or tend to prove, that his profit is taken from the shipper, and it can not be the case, as long as the shipper gets the full benefit of the Chicago prices in the near by market, and selects his own market, and as long as the Chicago prices are unaffected by the product rate. The advantage, if any, is over the Chicago packer.

Ryan's opinion was (1909) that the packer could *buy* better in Iowa than they do in Chicago, and that this gave him an undue advantage; but here, too, the Iowa packer must pay the Chicago prices, if he wants to buy. The Iowa shipper is, certainly, not foolish enough to sell his stock for any less, when he can select this market and ship to Chicago or elsewhere, as is to his best advantage. Ryan's comparison seems also to be rather between the Iowa and the Chicago packer than between the packer and the shipper.

These claims of undue advantage of the packer and the livestock shipper will not bear close scrutiny and are not sound.

Advantages to the Shipper of Near-by Markets.

It cannot require any argument to establish the proposition, that it is of material advantage to the livestock producer and shipper to have more than one market and to be able to market his stock at the near-by market rather than ship to the distant market at Chicago, provided he can get relatively as good a price. This is conceded by all of the witnesses, who were asked as to it. (Buell, 1345; Crosby, 247; Calkins, 535, 536.)

And in this connection, the testimony of Mr. Tomlin-

son as to the natural movement of the western livestock and the natural development of the near-by market is important. He says (1584), that the nearness of a market will cause stock to move to it; and that the natural movement of stock from the southwest is to Kansas City and St. Louis, and from Montana to Omaha; that the slaughtering at the point of origin has a natural advantage, which gives rise to the development of slaughtering and packing plants near source of production (1874); and that the natural movement of livestock from the west is to the western markets rather than to Chicago. (1882.) This natural advantage and natural movement of the livestock to the near market accounts fully for the growth and increase of the Missouri river and intermediate markets, and explains the fact that Chicago's receipts of cattle from Texas and the southwest have been declining for the past ten or twelve years (as Buell stated), and that these cattle go to Kansas City. It also accounts for the movement of hogs to St. Joseph and the other western packing centers. It is evidence of the growth and development of the western country and a natural result thereof. The point to be here emphasized is that this development and growth is essential to the general welfare of the country and especially to the shippers and producers of livestock on the one hand, and the consumer on the other.

III.

THE CLAIM OF COMPETITION BETWEEN THE LIVE ANIMAL AND THE PRODUCT AND BETWEEN THE PRODUCERS AND SHIPPERS OF LIVESTOCK AND THE MISSOURI RIVER PACKERS.

If the foregoing argument suffices to demonstrate that the shipper of livestock is not prejudiced or injured by the product rate, and that the prices, which he gets for his stock, are not lessened, and that the Missouri river and intermediate markets in addition to the Chicago market are a benefit and advantage to him, it also completely answers the claim in the present case that because of competition between the shipper and the packer and between the live animal and the product the rate on the product should not be less then on livestock. If the shipper is not in fact prejudiced or injured by the product rate and his prices for his livestock are not thereby lessened, it is not material so far as he is concerned whether this claim of competition is or not well founded.

But the term itself is misleading in this connection, for the reason that the great bulk of the product from the Missouri river and intermediate points is shipped to the Eastern markets or abroad, so that there is no competition in fact in the Chicago market between the live animal and the products. As Mr. Cowan said in his oral argument in the court below, all of the dressed beef from the Missouri river houses goes east; and the evidence shows that 80 per cent. or more of the packing house products are either shipped abroad or to the

eastern markets; so that there can be no claim of any such competition at Chicago. The evidence also shows that on livestock originating west of the Missouri river destined east of the Illinois and Indiana state line, the rate from the Missouri river is the same as the rate on the product and dressed beef. It also appears from Mr. Tomlinson's testimony (1777, 1778) that if the 23½ cent rate to Chicago on cattle and hogs is combined with the rates on cattle and hogs from Chicago to New York, the combined rates will be lower than the sum of the 18½ cent rate on the product and dressed beef and the rates on the product and dressed beef from Chicago to New York. If then there is competition at the consuming markets in the east (New York and Boston for example) between the live animal and the product, the rate from this territory in question on the live animal to the consuming market is not greater than the rate on the product.

But there is no competition in the market between the live animal and the product, and the term is misapplied when used in this connection. The competition under normal conditions would be between the packers, who ship their product to these different markets, and the sharper that competition should be, the better for the producer and shipper of livestock. Conditions are not normal in that particular for the reason that the Missouri river and the Chicago packers are substantially the same persons.

As to the local interests in Chicago, the Chicago Stock Yards and the Live Stock Exchange, it would seem that the statement of receipts and shipments on

the Chicago market, which shows that both the receipts and shipments are increasing, and that the Chicago market is not on the decline (See U. Stock Yards Report 1904, p. 46, 47), is a sufficient answer to any claim of prejudice or injury on their part. Their complaint seems to be, not that Chicago as a livestock market is waning, but that the Missouri river markets are growing more rapidly, which is accounted for by the growth and development of the territory tributary to them.

The case at bar must necessarily be determined from a practical standpoint and with reference to the peculiar conditions that are shown by the evidence to surround the packing business. It should not be decided on the purely theoretical basis of the proper relation between rates on the raw material and rates on the finished product; but the court will be compelled to "balance" the various interests that will be affected by an enforcement of the order of the Commission and to decide whether, in fact, there is any practical necessity for the enforcement of this order which will warrant the court in compelling these railroads to suffer the very heavy losses that will result from the reduction of these livestock rates, and whether the enforcement of this order "is likely on the whole to promote the public advantage." If the livestock shippers and producers are not in fact prejudiced by the product rate, so that their interests do not demand the enforcement of this order, it will be found that the remaining interests that claim to be prejudiced by this rate are of minor importance as compared with the general public interest in the development and maintenance of these western markets and with the interest of the con-

sumer in everything that tends to cheapen the price of the products, so that they may properly be disregarded.

Respectfully submitted,

S. A. LYNDE,
Counsel for Chicago & North-Western Railway Company.

Office Supreme Court, U. S.
FILED.
APR 11 1907
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. [redacted]-73.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,
vs. No. 27723.
CHICAGO GREAT WESTERN RAILWAY CO., et al.,
Appellees.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,
vs. No. 27329.
CHICAGO GREAT WESTERN RAILWAY CO., et al.,
Appellees.

Argument of ED. BAXTER,

Solicitor for Appellees as of Record.

Foster, Webb & Parkes, Nashville, Tenn.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 352.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,
vs. No. 27723.
CHICAGO GREAT WESTERN RAILWAY CO., et al.,
Appellees.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,
vs. No. 27829.
CHICAGO GREAT WESTERN RAILWAY CO., et al.,
Appellees.

Argument of ED. BAXTER,
Solicitor for Appellees as of Record.

STATEMENT OF THE CASE.

I.

PRELIMINARY STATEMENT.

A preliminary statement may serve to facilitate an understanding of the matters herein involved.

Case No. 27723 is a suit brought by the Interstate Commerce Commission to enforce an order made by it on January 7, 1905.

The traffic referred to in said order is the traffic in live cattle and live hogs, and the traffic in the dressed or prepared products thereof; and the order is directed to the relation of rates which should exist as between the live animal and the dressed product.

Kansas City, Mo., may be regarded as typical of the Missouri River slaughtering markets. Cattle and hogs are produced at points both east and west of Kansas City. From the territory of production *west* of Kansas City, cattle or hogs may be shipped into Kansas City, either to be slaughtered there; or, to try the market and move subsequently to Chicago, if the Kansas City market be unsatisfactory; or, they may be shipped direct from the point of production through Kansas City to Chicago. From the territory of production immediately *east* of Kansas City, cattle or hogs may be shipped for slaughter either to Chicago or to Kansas City, according to market conditions.

References will be found in the Report and Opinion of the Commission and in the testimony to the territory both east and west of the Missouri River, though the complaint of the Chicago Livestock Exchange before the Commission made specific reference only to the territory east of the Missouri River.

As the situation with respect to the territory east of the Missouri River is somewhat different from that west of the Missouri River, and as the territory east is that to which the complaint specifically refers, it would needlessly involve this preliminary statement to do more than explain the conditions in the territory east of the river; which, it may be stated, aside from any technical reading of the complaint, is the only territory so affected by the existing rate adjustment as to be of real consequence in the present case.

The principal factor which determines whether the cattle or hogs produced east of the Missouri River will be sold in Kansas City or in Chicago is, of course, the price offered. The prices of livestock in the different markets are affected by such a variety of causes that there is no fixed or stable relation between said prices. It may therefore at one time be to the interest of the producer of cattle or hogs in the territory immediately east of Kansas City to sell in the Kansas City market, and at another time to sell in the Chicago market, dependent upon the general market conditions.

A constant factor, however, in determining the ability of the Kansas City packer to bid for the livestock produced in the territory immediately east of Kansas City in competition with the Chicago packer is the fact that he can deliver the dressed product of such livestock in Chicago at a less total of freight charges on the live animal from point of production into Kansas City and on the product of the animal from Kansas City to Chicago, than the freight charges which would accrue for the transportation of the live animal direct from the point of production to Chicago, if it were bought by the Chicago packer. In this result, the fact that the weight of the product, which is shipped from Kansas City to Chicago, is materially less than the gross weight of the live animal, if shipped direct from the point of production to Chicago, plays an important part.

Although it is admitted by the Commission in its Report and Opinion that there are practically no shipments of livestock made locally from the Missouri River markets to Chicago, yet the most salient feature of the complaint before the Commission and of the Commission's order is the *relation of rates* on the livestock and the product *between the Missouri River markets and Chicago;* and upon the question of the movement from

intermediate points to Kansas City and Chicago respectively, it has this bearing.

The rate upon live cattle and hogs as well as upon the product thereof between Kansas City, for instance, and Chicago was formerly 23½ cents per hundred pounds. The rates now are: On live cattle and hogs from Kansas City to Chicago 23½ cents; on the product thereof 20 cents.

The product rate of 20 cents from the Missouri River to Chicago is of course an important factor in determining what will be the *total cost* of shipping the live animal from the point of production (east of Kansas City) into Kansas City, and shipping the product from Kansas City to Chicago, as against shipping the live animals direct from the point of production (east of Kansas City) to Chicago.

It is contended by appellant that the rates of 23½ cents on the livestock and 20 cents on the product, in effect between the Missouri River and Chicago, do not represent the proper relation; and it was held by the Commission that such relation is not proper. Under the order of the Commission, it would be proper to make the rates between the Missouri River and Chicago on the livestock, and the product, equal. If the livestock rate is to remain at 23½ cents between the Missouri River and Chicago, it would of course be necessary to raise the product rate to 23½ cents for the purpose of conforming to the order of the Commission. If the product rate were raised 3½ cents for the purpose of conforming to the order of the Commission as to what are proper relative rates between the Missouri River and Chicago, its incidental effect would be to increase the total cost of shipping the live animal from a point of production

east of Kansas City into Kansas City, and shipping the product from Kansas City to Chicago, as against shipping the live animals direct from the same point of production east of Kansas City to Chicago. The bearing therefore which the question of proper relative rates between the Missouri River and Chicago has upon the movement from intermediate stations to the Missouri River markets, and Chicago, respectively is an incidental bearing.

The complaint of the Chicago Livestock Exchange in this case before the Commission was that by reason of the fact that the rates per hundred pounds upon the dressed or prepared products of cattle and hogs were lower than the rates per hundred pounds upon the live animals, from said Missouri River points, and South St. Paul on the west, to Chicago on the east, the receipts of cattle and hogs at Chicago for slaughter had diminished, and that the effect of said relative adjustment had been to transfer a portion of Chicago's trade to her rivals. The contention of the complainant before the Commission was that as between the live animals and the products thereof, the rates should be so adjusted relatively as to effectually prevent such diversion of trade from Chicago.

In order to place the traffic in live animals, and the traffic in the products thereof, passing between the Missouri River and Chicago, upon an exact equality, so that it would be no more profitable to slaughter at the Missouri River than at Chicago, it would be necessary to take into consideration the fact that the weight of the product of the animal is always materially less than the gross weight of the animal from which the product is taken; and therefore to fix the rate per hundred pounds upon the products somewhat higher than the rate per hundred pounds upon the live animal between the Missouri River and

Chicago. It was claimed by the chief witness for the complainant before the Commission, and by the same witness in the Circuit Court, that the rate per hundred pounds upon the products between the Missouri River and Chicago should properly be 175 per cent of the rate per hundred pounds upon the animal.

While under the terms of the order of the Commission, appellees are not forbidden to make a relative adjustment between the Missouri River and Chicago, whereby the rate upon the product shall be 175 per cent of the rate on the live animals, they are nevertheless permitted to charge equal rates per hundred pounds upon the live animal and the product thereof, and the order of the Commission therefore falls short of accomplishing that for which the complainant before the Commission contended.

II.

The Decree Appealed from.

The bill in the first of the above-entitled causes (No. 27723) was filed on the 29th day of April, 1905, in the Circuit Court of the United States for the Northern Division of the Northern District of Illinois, to enforce an order made by the Interstate Commerce Commission on the 7th day of January, 1905, in the matter of the Chicago Live Stock Exchange v. The Chicago Great Western Railway Company et al.

Said order of the Commission declared that the present relation of rates maintained and enforced by appellees whereby their rates for transportation are higher upon live cattle and live hogs than upon the dressed or prepared products of cattle and hogs on shipments thereof to Chicago in the State of Illi-

nois, from points on the Missouri River (Sioux City in the State of Iowa to Kansas City, in the State of Missouri inclusive), and from South St. Paul in the State of Minnesota, or from points in the territory between the Missouri River or South St. Paul and Chicago, constitutes wrongful prejudice and discrimination, in violation of the provisions of the Act to Regulate Commerce; and said appellees were, by said order, notified and required to cease and desist, on or before the 15th day of February, 1905, from maintaining or enforcing the said alleged unlawful relation of rates, and from further continuing said alleged unlawful prejudice and discrimination.

Ex. "Q" to O. Bill, Trans., pp. 48, 49.

The bill in the second of the above entitled causes (No. 27829) was filed on the 17th day of July, 1905, in the same court, under what is known as the Elkins Act, approved February 19, 1903, and entitled "An Act to further regulate commerce with foreign nations and among the States."

In said last mentioned bill, it was averred that the appellees in charging and receiving the said higher rates on live cattle and live hogs than on the dressed or prepared products thereof were committing an unlawful discrimination against said live cattle and live hogs, the shippers thereof, and the traffic therein, in favor of said dressed or prepared products, the shippers thereof and the traffic therein.

The first bill was answered by the appellees; and to the second bill, appellees pleaded the pendency of the first bill. Said plea being overruled by the Court, appellees answered the second bill.

The two bills were consolidated by order of the Court, and were heard together.

Several volumes of testimony were taken before the Commission; and nearly 3,000 pages of additional testimony were taken in the Circuit Court.

On November 20, 1905, Hon. Solomon H. Bethea, District Judge, rendered his decision, which will be found inserted in the transcript between pages 176 and 177 and it was on the same date decreed by the Court that the petitions of the Interstate Commerce Commission in both of said causes be dismissed with costs.

Trans., pp. 178, 179.

From said decree, the Interstate Commerce Commission appealed to this Court.

In a designation filed in this Court by Hon. S. H. Cowan, special attorney for appellant, and Hon. L. A. Shaver, solicitor for appellant, it was directed that there be omitted in printing the petition and other pleadings, orders and affidavits in case bearing "No. 27829" in the court below, in which case the bill was filed under the Elkins Act.

Trans., pp. 2072-2078.

III.

The Petition Filed Before the Commission in Case No. 27723.

The petition before the Commission, which was filed by the Chicago Livestock Exchange, an association of livestock commission men, raisers, owners, shippers and slaughterers, averred in substance:

1. That the rates charged, collected or received by the appellees for the transportation of livestock, in carloads, from points in Iowa, Missouri, Minnesota and Wisconsin to the city of Chicago are in and of themselves, and relatively, as compared with rates charged by appellees on the product of livestock, unjust and unreasonable, in violation of Section 1 of the Act to Regulate Commerce.

2. That the raisers of livestock in the States of Iowa, Missouri, Wisconsin and Minnesota are subjected to an undue and unreasonable prejudice or disadvantage by reason of the rates charged, collected or received by appellees for the transportation of the product of livestock from Kansas City, South St. Joseph, South Omaha, Sioux City and South St. Paul to Chicago and points east thereof in violation of Section 3 of the Act to Regulate Commerce.

3. That the rates charged, collected or received by appellees for the transportation of the product of livestock from Kansas City, South St. Joseph, South Omaha, Sioux City and South St. Paul to Chicago and points east thereof, and that the rates charged, collected or received by appellees for the trans-

portation of livestock from said markets and intermediate points in Iowa, Missouri, Wisconsin and Minnesota to Chicago, subject the city of Chicago and the Chicago Livestock Exchange to an undue and unreasonable prejudice or disadvantage and are unlawful, in violation of Section 3 of the Act to Regulate Commerce.

Said petition prayed that the defendants (appellees) be required to answer the charges therein, and that after due hearing and investigation, an order be made commanding the defendants (appellees) to cease and desist from said alleged violations of the Act to Regulate Commerce and for such other and further orders as the Commission might deem necessary in the premises.

Trans., pp. 9, 10.

IV.

Answers to the Petition Filed Before the Commission in Case No. 27723.

Separate answers were filed to said petition before the Commission by each of appellees, except the Omaha & Kansas City Railroad Company, erroneously sued as The Omaha, Kansas City & Eastern Railroad Company; and the Chicago & Northwestern Railway Company, which latter company was not served with notice of the suit before the Commission.

Trans., pp. 11-27.

Said separate answers denied that the rates upon livestock in carloads, which were the subject of complaint, were unjust or unreasonable, either in and of themselves or relatively.

They further denied that the raisers of livestock in the States of Iowa, Missouri, Wisconsin or Minnesota were subjected to undue or unreasonable prejudice or disadvantage by reason of the rates charged, collected or received for the transportation of the product of livestock.

They further denied that the rates charged, collected or received for the transportation of either the product of livestock or the livestock itself subjected the city of Chicago or the Chicago Live Stock Exchange to undue or unreasonable prejudice or disadvantage.

Trans., pp. 11-27.

V.

Intervening Petitions Filed Before the Commission.

Intervening petitions were filed before the Commission by The Railroad & Warehouse Commissioners of the State of Minnesota; The St. Paul Union Stock Yards Company, of St. Paul, Minn.; The South St. Joseph Livestock Exchange; The Union Stock Yards Company, of Omaha, Neb.; The Sioux City Stock Yards Company, and the Sioux City Livestock Exchange, of Sioux City, Iowa.

Trans., pp. 159-177.

Said intervening petitions denied that the adjustments of rates complained of, so far as they applied to livestock, as between Chicago on the one hand, and the localities represented by the interveners respectively on the other, subjected complainant, the locality of Chicago, or producers of livestock in the States of Iowa, Missouri, Wisconsin or Minnesota to undue or unreasonable prejudice or disadvantage.

Trans., pp. 159-177.

VI.

The Hearing Before the Interstate Commerce Commission.

The case was heard before the Commission upon petition, answers, intervening petitions and testimony, and on January 7, 1905, the Commission filed its report and opinion.

Trans., p. 28.

VII.

The Order Made by the Interstate Commerce Commission.

On January 7, 1905, the Commission issued an order in accordance with its report and opinion of the same date.

Said order after reciting that the relation of rates maintained and enforced by appellees "whereby their rates for transportation are higher upon live cattle and live hogs than upon the dressed or prepared products of cattle and hogs on shipments thereof to Chicago, in the State of Illinois, from points on the Missouri River, Sioux City in the State of Iowa, to Kansas City, in the State of Missouri inclusive, and from South St. Paul, in the State of Minnesota, or from points in the territory between the Missouri River or South St. Paul and Chicago, constitutes wrongful prejudice and discrimination," required appellees to cease and desist, on or before the 15th day of February, 1905, from maintaining or enforcing said unlawful relation of rates, and from further continuing said unlawful prejudice and discrimination.

Trans., pp. 48, 49.

Appellees being advised that said order was not a lawful order declined to obey it.

VIII.

Proceedings in the Circuit Court.

The Interstate Commerce Commission filed a petition in the Circuit Court of the United States for the Northern Division of the Northern District of Illinois, at Chicago, to enforce its order made in the case of The Chicago Livestock Exchange v. The Chicago Great Western Railway Company et al.

Appellees answered the same denying the matters of equity therein alleged.

Appellant, the Interstate Commerce Commission, as hereinbefore shown in Section II filed a second bill under the Elkins Act, which, by order of the Court, was consolidated with the bill filed by the Commission to enforce its order.

Additional testimony was taken in the Circuit Court by each party.

The testimony taken before the Commission was admitted in evidence, and portions of it read to the Court, and all of it considered by the Court.

As stated above, in Section II, the Circuit Court rendered a decree that the petitions of the Interstate Commerce Commission in said causes be dismissed, and from that decree, appellant prayed and obtained an appeal to this Court.

IX.

The Rates which are Involved in this Controversy.

The rates which are involved in this controversy are set forth in tabulated form in the opinion of the Circuit Court and in the testimony as follows:

Statement Showing Rates on Cattle, Hogs, Packing-House Products and Fresh Meats, Carloads, from Missouri River and Other Points to Chicago, Ill. (Rates in Cents Per Hundred Pounds.)

To Chicago, Ill. From	Cattle	Hogs	Packing House Products	Fresh Meats
Kansas City, Mo.				
St. Joseph, Mo.	23.5	23.5	20	20
Atchison, Kans.	b 20	b 20		
Leavenworth, Kans.	c 18.5	c 18.5	a 18.5	a 18.5
Council Bluffs, Iowa.	23.5	23.5	20	20
Omaha, Neb.			a 18.5	a 18.5
South Omaha, Neb.				
Nebraska City, Neb.				
Sioux City, Iowa.	25	23.5	20	20
			a 18.5	a 18.5
St. Paul, Minn. or South St. Paul, Minn.	25	27	15.7	17
	—	b 17.5	a 14.6	a 15.7
Ottumwa, Iowa.	22	21	16	
Des Moines, Iowa.	22	23.5	18.5	
Marshalltown, Iowa.	22	21	16	
Cedar Rapids, Iowa.	21	18.5	13.5	

(a) Destined to points east of Illinois-Indiana State line.

(b) Applies on shipments originating beyond.

(c) When originating beyond and destined beyond the Illinois Indiana State line

Trans., pp. 177, 237, 398, 505.

Kansas City may be taken as illustrative of the group in which it occurs in said table, for the purpose of explaining the application of the various rates and proportional rates set forth.

"A 'proportional rate' is not fixed as a part of any particular through rate, but is used as a standing proportion of through rates to any number of points beyond the point to which it is given."

7 I. C. Rep., 347, N. Y. N. H. & R. Co. v. Platt.

In the following diagram, "A" represents a point west of Kansas City, where cattle and hogs are produced. "B" represents a point of consumption, east of the Illinois-Indiana State line, to which the dressed products of cattle and hogs may be shipped from either Kansas City or Chicago, or to which live cattle and hogs may be shipped direct from "A."

A	Kansas City	Chicago	B
•	•	•	•

If live cattle or hogs be shipped from Kansas City, as a point of origin, to Chicago, as a point of destination, the rate is 23½ cents per hundred pounds.

If packing-house products or fresh meats be shipped from Kansas City, as a point of origin, to Chicago as a point of destination, the rate is 20 cents per hundred pounds.

The excess of 3½ cents per hundred pounds in the rate on the live animal over the rate per hundred pounds on the product thereof is condemned by the order of the Commission, which requires that the rate upon the animal should not be higher than the rate upon the dressed or prepared product.

If live cattle or hogs be shipped from "A" through Kansas City to Chicago for slaughter, such cattle or hogs pay from "A'" to Kansas City the local rate in effect between "A" and

Kansas City, and from Kansas City to Chicago a proportional rate of 20 cents, which rate of 20 cents is 3½ cents less than the rate which would accrue upon cattle or hogs between Kansas City and Chicago, if they actually originated at Kansas City, instead of at a point west thereof.

The proportional rate of 20 cents, which accrues on cattle or hogs from Kansas City to Chicago in the case supposed, is exactly equal to the local rate of 20 cents upon packing-house products and fresh meats from Kansas City to Chicago. Inasmuch as the order of the Commission permits equality of rates upon the live animals and the product, the proportional rate of 20 cents on the animals as compared with the 20 cent rate on the product conforms to the order of the Commission.

The local rate of 23½ cents on shipments of cattle and hogs originating at Kansas City and destined to Chicago and the proportional rate of 20 cents, which accrues on shipments of cattle and hogs between Kansas City and Chicago, on shipments originating west of Kansas City, are, however, 5 cents and 1½ cents respectively, higher than the proportional rate of 18½ cents on packing-house products and fresh meats, which accrues between Kansas City and Chicago on shipments originating at Kansas City and shipped through Chicago to "B."

As regards said proportional rate of 18.5 cents per hundred on packing-house products and fresh meats, said local rate of 23½ cents and said proportional rate of 20 cents on cattle and hogs do not conform to the order of the Commission.

If cattle or hogs be shipped from "A" on through bill of lading through Kansas City and through Chicago to "B," they

pay the local rate from "A" to Kansas City, plus a proportional rate of 18.5 cents from Kansas City to Chicago, plus the rate from Chicago to "B."

Comparing this proportional rate of 18.5 cents on cattle and hogs with the rates shown in said table on packing-house products and fresh meats, we find that it is less than the local rate of 20 cents on the product, which applies where the product originates at Kansas City and is destined to stop at Chicago, and it is not higher than the proportional rate of 18.5 cents on packing-house products and fresh meats, which accrues between Kansas City and Chicago, on a shipment originating at Kansas City and destined to "B." Inasmuch therefore as the proportional rate of 18.5 cents on cattle and hogs is not higher than either the 20 cent rate on packing-house products and fresh meats, which applies locally between Kansas City and Chicago, or the 18.5 cents proportional rate on packing-house products and fresh meats which applies on shipments destined beyond Chicago, said proportional rate of 18.5 cents on cattle and hogs is in strict conformity with the order of the Commission.

It follows therefore that so far as the Kansas City group of points is concerned, the rates which are not in conformity with the order of the Commission are:

1. The local rate of 23.5 cents applicable on cattle and hogs originating locally at Kansas City and shipped to Chicago; its excess over the local rate of 20 cents on packing-house products and fresh meats between Kansas City and Chicago being 3½ cents, and its excess over the proportional rate of 18.5 cents on packing-house products and fresh meats being 5 cents.

2. The proportional rate of 20 cents on cattle and hogs ac-

cruing between Kansas City and Chicago on shipments of cattle and hogs originating west of Kansas City and destined to Chicago, which is 1½ cents higher than the proportional rate of 18.5 cents accruing between Kansas City and Chicago on shipments of packing-house products and fresh meats, which originate at Kansas City and are destined to "B."

Omaha may be taken as illustrative of the group in which it occurs in said table for the purpose of explaining the application of the various rates set forth.

In the following diagram, "A" represents a point west of Omaha where cattle and hogs are produced. "B" represents a point of consumption east of the Illinois-Indiana State line, to which the dressed products of cattle and hogs may be shipped from either Omaha or Chicago.

A	Omaha	Chicago	B

If live cattle or hogs be shipped from Omaha as a point of origin to Chicago as a point of destination, the rate is 23½ cents per hundred pounds.

If packing-house products or fresh meats be shipped from Omaha as a point of origin to Chicago as a point of destination, the rate is 20 cents per hundred pounds.

The excess of 3½ cents per hundred pounds in the rate on the live animal over the rate per hundred pounds on the product thereof is condemned by the order of the Commission, which requires that the rate upon the animal should not be higher than the rate upon the dressed or prepared product.

There is a proportional rate of 18½ cents on packing-house products and fresh meats, which accrues between Omaha and Chicago, on shipments originating at Omaha and shipped through Chicago to "B."

The local rate of 23½ cents per hundred on shipments of cattle and hogs, originating at Omaha and destined to Chicago is 5 cents higher than said proportional rate of 18½ cents; and therefore said local rate of 23½ cents as compared with said proportional rate of 18½ cents is not in conformity with the order of the Commission, which requires that the rate upon the live animal shall not be higher than upon the dressed or prepared product.

There is not in the case of Omaha, as there is in the case of Kansas City, a proportional rate of 20 cents on cattle and hogs from Omaha to Chicago, applicable on shipments originating at "A;" such shipments originating at "A" and passing through Omaha to Chicago, being required to pay the regular local rate of 23½ cents hereinabove referred to from Omaha to Chicago.

Nor is there in the case of Omaha a proportional rate of 18.5 cents on cattle and hogs, which would apply between Omaha and Chicago on a through shipment of cattle and hogs from "A" to "B."

It follows therefore that so far as the Omaha group is concerned, the only rate which is not in conformity with the order of the Commission is the local rate of 23½ cents on cattle and hogs from Omaha to Chicago, its excess over the local rate on packing-house products and fresh meats between Omaha and

Chicago being 3½ cents, and its excess over the proportional rate of 18½ cents on packing-house products and fresh meats being 5 cents.

By reference to the remainder of the points in the table hereinabove set forth, it will be seen that:

The local rates from Sioux City to Chicago on cattle and hogs exceed the local rates and the proportional rates applicable between Sioux City and Chicago on packing-house products and fresh meats.

The local rates on cattle and hogs and the proportional rate on hogs from St. Paul and South St. Paul to Chicago exceed the local and proportional rates on packing-house products and fresh meats from St. Paul and South St. Paul to Chicago.

The local rates on cattle and hogs from Ottumwa, Des Moines, Marshalltown and Cedar Rapids to Chicago exceed the local rates on packing-house products from said places to Chicago.

None of said latter rates are therefore in conformity with the order of the Commission that the rate upon the live animal shall not be higher than the rate upon the product thereof.

X.

The Contract Made by the Chicago Great Western Railway Company with the Packers Doing Business at Missouri River Points.

To this point, statements as to the rates on cattle, hogs, packing-house products and fresh meats have been directed to show what the existing rates are, and wherein they fail to conform to the terms of the order of the Interstate Commerce Commission. Nothing has been said as to the causes which led to the adoption of the relative adjustment which is the subject of complaint.

The Chicago Great Western Railway entered into a contract, which took effect on August 8, 1902, with all packers doing business at the Missouri River, whereby certain rates on packing-house products and fresh meats were guaranteed for a period of seven years; and it was the disturbance of the previously existing relative adjustment of rates on live cattle and hogs as compared with the rates on the products thereof, resulting from said contract rates, that precipitated the present litigation.

The rates established by the Chicago Great Western Railway Company were necessarily met by its competitors at points reached by the Chicago Great Western Railway; and also by its competitors at packing-house points other than those reached by the Chicago Great Western Railway; but which were in competition with the packing-house points reached by the Chicago & Great Western Railway.

Rep. & O Ex. P. to O. Bill, Trans., p. 32.

The Commission, in its Report and Opinion, Trans., p. 34, thus succinctly states the facts with respect to the Chicago Great Western contract:

"On August 8, 1902, pursuant to a contract entered into between the Chicago Great Western Company on the one hand and all packers doing business at the Missouri River points on the other, that company established and put in force from Kansas City and St. Joseph on the products of livestock a rate of 20 cents on traffic destined to Chicago and a rate of 18½ cents on traffic destined to points east of the Indiana-Illinois State line. The contract provided that these rates should remain in force seven years, in consideration whereof the packers agreed to deliver to the Chicago Great Western a certain percentage of their traffic in the products, or, upon failure to do so, pay it each month, by way of liquidated damages, an agreed amount for each car short. The action of the Chicago Great Western was followed by other interested carriers and corresponding rates were put in force from the other Missouri River points."

Rep. & O. Ex. P. to O. Bill, Trans., p. 34.

And further:

"The President of the Chicago Great Western stated that his company entered into the contract for the purpose of securing more of the traffic in the livestock products than it had previously been able to obtain."

Rep. & O., Ex. P. to O. Bill, Trans., p. 45.

The Commission in its Report and Opinion goes into the history of the rates in controversy, and the following tabulation of rates from Kansas City, St. Joseph, Atchison and Leavenworth to Chicago, based upon said report and opinion, shows

the history of the rates up to and including August 8, 1902, the date when the Chicago Great Western contract took effect:

	Cattle	Hogs	P'k'g-house Products	Fresh Meats
December 1, 1894, to August 8, 1902.....	23½	23½	23½	23½
Aug. 8, 1902 (guaranteed by C. G. W. Ry. for 7 yrs.)			20	20
January 1, 1902, to August 8, 1902			(a) 18½	(a) 18½
Aug. 8, 1902 (guaranteed by C. G. W. Ry. for 7 yrs.)			(a) 18½	(a) 18½
April 14, 1902, to August 8, 1902	(b) 18½	(b) 18½		

(a) Proportional rate applicable on traffic destined to points east of Indiana-Illinois State line.

(b) Proportional rate applicable on traffic either originating at points west of Missouri River, or destined to points east of the Illinois-Indiana State line.

Rep. & O., Ex. P. to O. Bill, Trans., p. 33.

It will be noted from the first extract from the Report and Opinion of the Commission above quoted, that the entire effect of the Chicago Great Western contract was to change the local rate of 23½ cents on packing-house products and fresh meats, which was in effect prior to August 8, 1902, from Kansas City, etc., to Chicago, to 20 cents, and guarantee said rate for seven years; and to adopt the proportional rate of 18½ cents on packing-house products and fresh meats which was already in effect prior to August 8, 1902, and guarantee same for seven years.

The local rate of 23½ cents on cattle and hogs and the proportional rate of 18½ cents on cattle and hogs remained undisturbed.

The following tabulation of rates from Council Bluffs, Omaha, South Omaha and Nebraska City, based upon the Report and Opinion of the Commission, shows the history of the rates up to and including August 8, 1902, the date when the Chicago Great Western contract took effect:

	Cattle	Hogs	P'k'g-house Products	Fresh Meats
December 1, 1894, to August 8, 1902.....	23½	23½	23½	23½
Aug. 8, 1902 (guaranteed by C. G. W. Ry. for 7 yrs.)			2	20
January 1, 1902, to August 8, 1902			(a) 18½	(a) 18½
Aug. 8, 1902 (guaranteed by C. G. W. Ry. for 7 yrs.)			(a) 18½	(a) 18½

(a) Proportional rate applicable on traffic destined to points east of Indiana-Illinois State line.

It will be noted from the first extract from the Report and Opinion of the Commission above quoted that the entire effect of the Chicago Great Western contract was to change the local rate of 23½ cents on packing-house products and fresh meats, which was in effect prior to August 8, 1902, from Omaha, etc., to Chicago, to 20 cents, and guarantee said rate for seven years; and to adopt the proportional rate of 18½ cents on packing-house products and fresh meats which was already in effect prior to August 8, 1902, and guarantee same for seven years.

The local rate of 23½ cents on cattle and hogs from Omaha, etc., to Chicago remained undisturbed.

The reductions in the rates made by the Chicago Great Western Railway Company, on August 8, 1902, on packing-house products and fresh meats, from said Missouri River points to Chicago, had their effect upon the rates on packing-house products and fresh meats, from Sioux City, St. Paul, Ottumwa, Des Moines, Marshalltown and Cedar Rapids, and resulted as to said latter points either in creating disparities not previously existing, or in increasing already existing disparities between the rates on the live animals and the products thereof, the rates from those points upon the products being in all cases now lower than upon the live animals.

Trans., p. 33.

XI.

The Contract Made by the Chicago Great Western Railway Company—Continued.

As the result of investigations undertaken by the Interstate Commerce Commission in December, 1901, and January, 1902, it was shown that rates upon packing-house products "were in a most demoralized condition;" and on March 24-25, 1902, restraining orders or temporary injunctions were granted by Judge Grosscup to compel the appellees, in the case at bar, to maintain their published rates.

16 Ann. Rep., I. C. C., 1902, p. 7.

17 Ann. Rep., I. C. C., 1903, p. 65.

The *published* rates in effect from Missouri River points to Chicago on March 24-25, 1902, which appellees were enjoined to maintain were as follows:

Cattle	Hogs	P'k'g-house Prod.	Dressed Meats
23½	23½	23½ local	23½ local
		(a) 18½ pro.	(a) 18½ pro.

(a) Proportional rate applicable on traffic destined to points east of Indiana-Illinois State line.

Rep. & O., Trans., p. 33.

The Commission in its sixteenth annual report, referring to the restraining orders or temporary injunctions granted by Judge Grosscup, said:

"It is asserted, and the Commission believes, that these railways have obeyed the injunction in the main, if not altogether; that published rates have been exacted upon their line, and very generally by other lines in competition with them."

16 Ann. Rep., I. C. C., p. 9.

Because the published rates were being maintained when the Chicago Great Western contract was made, it is claimed on behalf of appellant that there was no *competition in rates* at the time the rate upon the product between the Missouri River and Chicago was reduced by the Chicago Great Western Railway. The discrimination complained of in this case was held by the Commission to be the result of the voluntary and wrongful act of the Chicago Great Western Railway, and therefore unjust.

While it is admitted by appellees that between March 24-25, 1902, and the effective date of the Chicago Great Western contract, August 8, 1902, there was no cutting of rates, it is not admitted by appellees that there was no *competition which affected rates.*

In the case of Tex. & Pac. Ry. v. I. C. C., 162 U. S., pp. 233, 234, this Court held, among other things, that in passing upon questions arising under the third section, "competition that affects rates should be considered."

And the contention of appellees in this case is that notwithstanding published rates were maintained during the period from March 24-25, 1902—the date of the issuance of the restraining orders and temporary injunctions—down to August 8, 1902, the effective date of the Chicago Great Western contract, there existed a material and substantial competition between the rival carriers for the business of the Missouri River packers, which so "affected rates" that on August 8, 1902, the Chicago Great Western Railway was forced to reduce the published rates on packing-house products in order to secure its share of that traffic.

The contention of appellees is that said reduction in the published rates, made effective on August 8, 1902, by the Chicago Great Western Railway Company, was the *result* of the competition *then existing;* that said reduction was neither a wrongful nor voluntary act on the part of the Chicago Great Western Railway, and was therefore not unjust; but was forced upon said company by the fact that its competitors were, under the then existing rates, securing more than their proportion of the competitive traffic; and if the Chicago Great Western Railway had not made said reduction, it would have been forced to abandon a portion of its share of the competitive traffic to its rivals.

XII.

The Competition on the Products is More Severe than the Competition on the Live Cattle and Hogs Between the Missouri River and Chicago.

In its Report and Opinion in the case at bar, the Commission said:

"It often happens that the interests of carriers serving the same territory are in conflict, and under such circumstances, one carrier will sometimes make a rate on a particular kind of traffic that will result in considerable injury to persons and localities interested in another kind of traffic, and also to competing carriers, and, apparently, this is what has happened in the present case.

"Livestock and its products are in sharp competition with each other in the different markets, and some of the defendants are more interested in the former than in the latter, and vice versa. Those whose lines reach Chicago and also run through livestock districts in States west, northwest and southwest of the Missouri River desire the long haul they will obtain if the livestock be shipped to Chicago, while those whose lines terminate at the river, wish the livestock to be slaughtered there, because this will give them an opportunity to participate in hauling the products. And this conflict of interest appears to be largely responsible for the adjustment of rates complained of."

Rep. & O., Trans., pp. 31, 32.

In the opposite diagram, No. 1, there are shown the lines of the appellees which reach Chicago and also run through the

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livestock districts in States west, northwest and southwest of the Missouri River. They naturally desire the long haul which they will obtain if the livestock, instead of stopping at the Missouri River to be slaughtered is carried on to Chicago, viz.:

1. C. & N. W. Ry.
2. C. B. & Q. Ry.
3. C. M. & St. P. Ry.
4. C. R. I. & P. Ry.

In the opposite diagram, No. 2, there are shown the lines of the appellees which reach Chicago, but which terminate at the Missouri River, and therefore do not run through the livestock districts located west, northwest and southwest of that river. They naturally desire that livestock originating west, northwest and southwest of the Missouri River, instead of being carried on to Chicago, shall be slaughtered at said river, so that they may have an opportunity to compete for the carriage of the products, viz.:

1. C. G. W. Ry.
2. C. & A. Ry.
3. I. C. R. R.
4. Wabash R. R.

The lines of appellees which run through the livestock districts west, northwest and southwest of the Missouri River also extend from said river to Chicago, and if they cannot obtain the long haul on the livestock to Chicago, they desire to participate in the carriage of the products from the Missouri River to Chicago; and consequently all of the following railways com-

pete for the carriage of the products between the Missouri River and Chicago; as shown in the opposite diagram No. 3.

1. C. R. I. & P. Ry.
2. C. M. & St. P. Ry.
3. C. B. & Q. Ry.
4. C. & N. W. Ry.
5. C. G. W. Ry.
6. C. & A. Ry.
7. I. C. R. R.
8. Wabash R. R.

As there are twice as many railways competing for the carriage of the products between the Missouri River and Chicago as are competing for the carriage of the livestock west, northwest and southwest of said river, it is natural that the competition for the carriage of the products should be much more severe than the competition for the carriage of the livestock.

Furthermore as the owners of livestock are far more numerous and not so closely organized as the packers, they have been unable to induce the railways to enter into as severe competition on the livestock as the packers have been able to bring about for the carriage of the products; and consequently the rates on the livestock have not been reduced as low as those on the products.

How severe this competition for the products has been in the past is shown by the following extract from the Report and Opinion of the Commission with reference to the conditions which prevailed in 1890 and prior thereto, viz.:

"Aside from the rates in question, carriers generally make rates on livestock somewhat, and in many cases considerably lower than on the products. This was formerly true concerning rates made by carriers operating between the Missouri River and Chicago; but soon after the large packers erected packing-houses at different points on the Missouri River, changes began to take place. The tonnage controlled by the packers was comparatively large, and this fact enabled them to obtain secret concessions from individual carriers. These concessions, being discovered by other interested carriers, were followed by open reductions in the published rates applied on the products. As corresponding reductions were not made in the livestock rates the relation formerly existing between livestock and its products became changed. The rate on packing-house products from Missouri River points to Chicago was finally made 5 cents per 100 pounds less than on live hogs."

Rep. & O., Trans., pp. 31, 32.

On the trial of this cause in the Circuit Court, there was introduced in evidence a letter written by Mr. A. B. Stickney, President of the Chicago Great Western Railway, to his stockholders, of date August 4, 1902. This letter was an explanation by Mr. Stickney, as President of the Chicago Great Western Railway, of the conditions under which he entered into the contracts with the Missouri River packers guaranteeing certain rates between the Missouri River and Chicago upon packing-house products and dressed meats for a period of seven years. How nearly the conditions, as President Stickney saw them, coincided with the conditions as described by the Commission in the extract quoted above, is shown by the following statements contained in said letter, viz.:

"As soon as the injunction (of March, 1902), was granted

by the Court, it was evident to both parties that the old method of making rates must be permanently abandoned—that thereafter lawful rates must be established by printing, filing and publishing the rates which would thereafter be actually collected. But no one seemed to know what uniform rates, under the circumstances, could be collected. No one but the packers themselves knew or could ascertain the average rate they had actually paid during the years in which secret rates had been made in the manner which has been described. The packers went through their records and reported that, although they had sometimes paid more and sometimes less, the average rate which they had actually paid during more than 15 years between the Missouri River and Chicago was a fraction less than 16 cents per hundred weight."

"The railway companies felt that the average rate had been too low, and the packers expressed a willingness to pay a rate 15 per cent higher, provided it could be made uniform and stable. An advance of 15 per cent on the 16 cent rate is 2.4 cents per hundred weight, a considerable percentage of the packers' net profits, and would make the rate which the packers offered 18.4 cents."

Trans., p. 1913.

. . . . . .

"The Chicago Great Western Railway Company was not in favor of the 23 cent rate (Note —. This refers to the rate on packing-house products and dressed meats which was in effect prior to August 8, 1902, and should read '23½ cent rate' instead of '23 cent rate') because the railway companies do not need so large an advance, the packers would not consent to it, and based on 15 years of experience, it was convinced that, if

attempted, it would induce constant cutting of rates by the lawful method of publishing tariffs, instead of the previous unlawful method of secret rebates, which, in the end, would probably result in even lower rates than the 16 cent rates which have heretofore obtained."

Trans., pp. 1914, 1915.

. . . . . .

"The rates which the Chicago Great Western Company has agreed to put into effect on its line are 20 cents from the Missouri River to Chicago, which is 25 per cent higher than the average of the last 15 years, and 18½ cents on such products passing through Chicago, which is 15 per cent higher than the average for the last 15 years. The bulk of the business carries the 20 cent rate, because the bulk of the products of the Missouri River points is shipped to Chicago for further manipulation and to be routed to suit the various markets of consumption to which they are reshipped."

Trans., p. 1915.

As will be hereinafter shown, Kansas City and St. Joseph were the only two of the Missouri River markets which were reached by the Chicago Great Western Railway on August 8, 1902, when the contract between that company and the packers was made; and between Kansas City and St. Joseph on the one hand, and Chicago on the other, the Chicago Great Western Railway labored under the physical disadvantage of having a longer line than any of its competitors, and of being materially longer than the shortest line.

Furthermore its present line to Omaha was then under construction, and as stated in President Stickney's letter (Trans.,

p. 1916), the contracts which he made, guaranteed a large volume of gross revenue for said Omaha extension, when completed.

The competition between all of the competing lines between the Missouri River and Chicago for the traffic in packing-house products and dressed meats was therefore severe, and of all said competing lines, the disadvantages of the Chicago Great Western were greatest. Its action can only be said to be "voluntary" in the sense that as between taking active steps to secure its proportion of the business, and supinely allowing all of the business to go to its rivals, it elected to secure its proportion.

But as hereinbefore stated, the contention of appellees is that said reduction, made effective on August 8, 1902, by the Chicago Great Western Railway Company, was the *result* of the competition *then existing;* that said reduction was neither voluntary nor wrongful on the part of the Chicago Great Western Railway Company, and therefore did not create unjust discrimination; but was forced upon said company by the fact that its competitors were, under the then existing rates, securing more than their proportion of the competitive traffic; and if the Chicago Great Western had not made said reduction, it would have been forced to abandon a portion of its share of the competitive traffic to its rivals.

To this point, the facts have been set forth solely with a view of predicating upon them the argument which is to follow, namely, that even if the effect of the Chicago Great Western contract was to disturb the relation of rates existing immediately previous to August 8, 1902, on the live animals and the products, to the advantage of Missouri River cities and to the det-

riment of Chicago, said company was justified in its action because of the compelling competition then existing, and is not, therefore, in legal contemplation, guilty of unjust discrimination against the traffic in livestock.

This statement of facts would, however, be incomplete, were not attention directed to an erroneous assumption indulged by the Commission.

In its Report and Opinion, Trans., p. 32, the Commission states that soon after the packing-houses on the Missouri River were erected, concessions began to be made in the rates on packing-house products, and that the rate on packing-house products from the Missouri River to Chicago was finally made 5 cents per hundred pounds less than the rate on live hogs, and that this relation continued until January 1, 1891.

Trans., p. 32.

As the result of investigations undertaken by the Interstate Commerce Commission in December, 1901, and January, 1902, it was shown that the rates upon packing-house products "were in a most demoralized condition," and on March 24, 25, 1902, restraining orders or temporary injunctions were granted by Judge Grosscup to compel the appellees to maintain their published rates.

16 Ann. Rep., I. C. C., 1902, p. 7.

17 Ann. Rep., I. C. C., 1903, p. 65.

In the letter written by President Stickney to his stockholders, Trans., p. 1913, it is stated:

"No one but the packers themselves knew or could ascertain the average rate they had actually paid during the years in

which secret rates had been made in the manner which has been described. The packers went through their records and reported that, although they had sometimes paid more and sometimes less, the average rate which they had actually paid during more than 15 years between the Missouri River and Chicago was a fraction less than 16 cents per hundred weight."

Trans., p. 1913.

Notwithstanding the Commission knew that prior to 1891, the rates on the product were 5 cents less than the rate on the live hogs; notwithstanding the rates in 1901 and 1902 were so demoralized that injunctions had to be resorted to; and notwithstanding the average rate which was actually paid by the packers during more than 15 years, between the Missouri River and Chicago, was a fraction less than 16 cents per hundred weight, the Commission in its Report and Opinion erroneously assumes that Mr. Stickney by his contract effective August 8, 1902, inaugurated a radical departure from previous conditions, and that such departure placed Chicago at a disadvantage which she had never before experienced. In this connection, the Commission says:

"The large interests affected, the immense amount of money invested, the many livestock markets and packing centers *that have been built up and maintained under the former relation of rates, and the injury that will result if the change in that relation is permitted to continue*, amply warrant the conclusion that the discrimination in question is not justified by the desire of the Chicago Great Western Company to benefit its stockholders by increasing its business."

Rep. & C., Trans., p. 46.

If it be true that the average rate paid for more than 15

years between the Missouri River and Chicago on packing-house products was a fraction less than 16 cents per hundred weight, as reported by the packers, that must have been the rate on which the Missouri River markets were built up, instead of the disregarded published rates which were almost 50 per cent higher. The question therefore arises, how did Mr. Stickney hurt Chicago by establishing a local rate of 20 cents and a proportional rate of 18½ cents on packing-house products for a period of seven years between the Missouri River and Chicago, both of which rates are higher than 16 cents? The answer is that if Mr. Stickney altered Chicago's permanent situation at all with respect to the Missouri River markets, he altered it to Chicago's advantage, in that he established upon the products rates which were higher than previous rates, and which it was practicable to maintain, while the 23½ cent rate observed in obedience to restraining orders would have obliterated the packing-house business at the Missouri River and could not therefore have been maintained as the published rate for any considerable time. As said by Mr. Stickney in the letter to his stockholders:

"With such a narrow margin of profit (i. e., 1½ per cent), it is easy to see that freight rates are an important factor in the packing-house business. It is estimated that the annual freight bills amount to three times the annual profits. Hence, any increase in the rates which have been established for years, to which the whole business has been adjusted, is a serious matter, and when the increase is as much as 50 per cent at one jump (i. e., from a fraction less than 16 cents to the 23½ cent published rate), *it obliterates the entire margin of profits* for the time being, and until business is readjusted, which certainly cannot be done in a day or short time."

Trans., pp. 1911, 1912.

While therefore Mr. Stickney entered into his contract with the packers at a time when the rates of 23½ cents on both livestock and the product were being maintained by all lines between the Missouri River and Chicago, the practical effect of his action was to perpetuate in the form of a seven-year contract the approximate result of more than 15 years of severely competitive conditions on the part of all the carriers between the Missouri River and Chicago; and, as before stated, he was compelled to compete in this irrevocable manner for the purpose of securing his share of the business; being at the physical disadvantage of having the longest line between Kansas City and St. Joseph on the one hand and Chicago on the other, and under the disadvantage at Omaha of being a newly constructed line with no established patronage.

The present relation of rates on livestock and the product is therefore justified not only upon the ground relied upon by appellees that so far as the Chicago Great Western Railway is concerned, it was forced by compelling competition to lower the published rate between the Missouri River and Chicago upon the products of livestock for the purpose of securing its share of the traffic; but upon the further ground that the actual published rates upon the product which the Chicago Great Western Railway established, approximate the result of fifteen years of that material and substantial competition between rail carriers subject to the act, which it has been held by this Court may be taken into consideration in passing upon questions arising under the third section.

Counsel for appellant contended in the Circuit Court, with no authority in support of his argument, that the competition which existed prior to March 24-25, 1902 (the date when the injunctions were issued), inasmuch as it consisted of secretly and illegally cutting rates, could not be relied upon by appellees.

It is not conceded that a railroad company cannot rely upon actually existing competition when it is such as to affect rates, merely because it may have been conducted by secretly and illegally cutting rates. It is needless, however, to discuss the proposition, because appellees rest their defense upon the competition which existed between March 24-25, 1902, when the injunctions were granted and August 8, 1902, when the Chicago Great Western contract took effect; and during that period there is no pretense that the competition was in any respect illegal.

XIII.

The Disadvantages Under which the Chicago Great Western Railway Labored as a Competitor for Traffic Between the Missouri River and Chicago.

As stated in Chapter XII. Kansas City and St. Joseph were the only two of the Missouri River markets which were reached by the Chicago Great Western Railway at the time the contract between that company and the packers was made; and between Kansas City and St. Joseph on the one hand, and Chicago on the other, the Chicago Great Western Railway labored under the physical disadvantage of having a longer line than any of its competitors, and of being materially longer than the shortest line.

Furthermore its present line to Omaha was then under construction, and as stated in President Stickney's letter (Trans., p. 1916), the contracts which he made guaranteed a large volume of gross revenue for said Omaha extension when completed.

Reference was also made by President Stickney in his letter to the then proposed extension of the Chicago Great Western to Sioux City and the large volume of gross revenue which would be secured for said Sioux City extension when completed (Trans., p. 1916). However the plan of extending the lines of the Chicago Great Western Railway to Sioux City was not carried into execution.

The opposite diagram No. 4, shows graphically the disadvantage of the Chicago Great Western Railway, as a competitor for the traffic between Kansas City and St. Joseph on the one hand, and Chicago on the other.

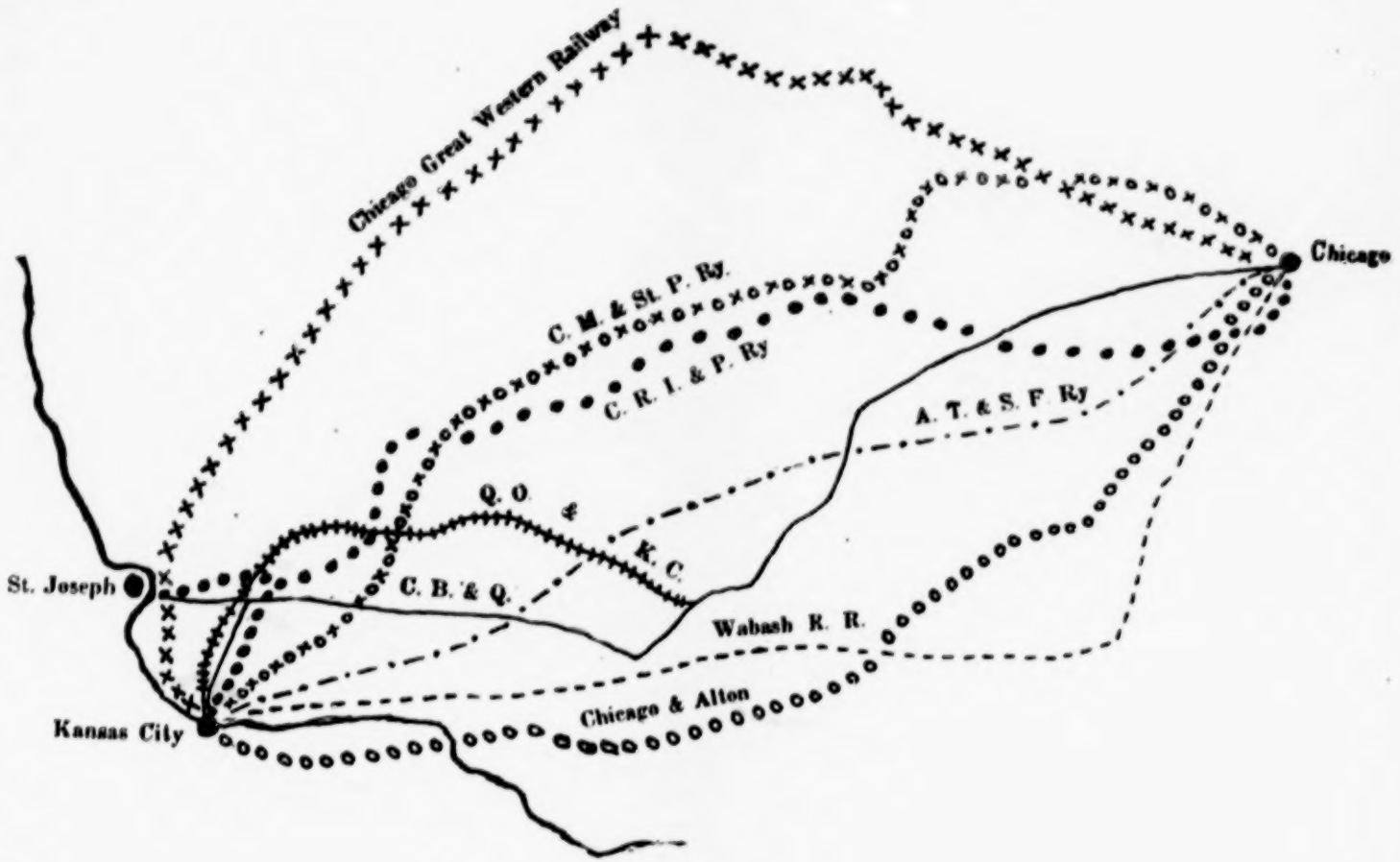
The following table sets forth the various lines competing between Kansas City and Chicago in order of their length, viz.:

A. T. & S. F. Ry	458 miles.
C. B. & Q. R. R.	488 miles.
Chicago & Alton R. R.	488 miles.
C. M. & St. P. Ry	498 miles.
Wabash R. R.	512 miles.
Q. O. & K. C. R. R.	513 miles.
C. R. I. & P. Ry	517 miles.
Chicago Great Western Railway	597 miles.

Official Guide of the Railways and Steam Navigation Lines of the United States, Porto Rico, Canada, Mexico and Cuba, September, 1906, pp. 113, 622, 641, 699, 713, 759, 760, 774, 788, 792.

It will be noted that the disadvantage of the Chicago Great Western Railway, as compared with the A. T. & S. F. Ry., which has the shortest line, is 139 miles; and that its disadvantage as compared with the longest of its competitors, the C. R. I. & P. Ry., is 80 miles.

DIAGRAM NO. 4.


Chicago Great Western Railway
C. M. & St. P. Ry.
C. R. I. & P. Ry
A. T. & S. F. Ry
Chicago
Q. O. & K. C.
St. Joseph
C. B. & Q.
Wabash R. R.
Chicago & Alton
Kansas City

The following table sets forth the various lines competing between St. Joseph and Chicago, in order of their length:

C. B. & Q. R. R.....470 miles.
A. T. & S. F. Ry.....489 miles.
C. R. I. & P. Ry.....498 miles.
Chicago Great Western Railway.....529 miles.

Official Guide of the Railways and Steam Navigation Lines of the United States, Porto Rico, Canada, Mexico and Cuba, September, 1906, pp. 713, 759, 774, 792.

It will be noted that the disadvantage of the Chicago Great Western Railway, as compared with the C. B. & Q. R. R., which has the shortest line, is 59 miles; and that its disadvantage as compared with the longest of its competitors, the C. R. I. & P. Ry., is 31 miles.

As to the traffic from Omaha to Chicago, the Chicago Great Western Railway when completed labored under no disadvantage with respect to distance that could be considered material; but as hereinbefore stated, it labored under the perhaps more serious disadvantage of being a new line with the necessity upon it of establishing a patronage.

XIV.

The Question of "Cost of Carriage" in its Bearing Upon the Relative Rates which Should be Established Upon Livestock and the Products Thereof.

The many references in the Report and Opinion of the Commission and the amount of testimony in the record on behalf of both appellant and appellees as to the relative cost of car-

riage of livestock and the products thereof are apt to create a passing impression that the question of the "cost of carriage" may have been considered the *determining factor* in arriving at the proper relative rate adjustment; whereas, it was but one of the elements considered, and it is not considered controlling by either the Commission or the railroads.

The question of the relative cost of carriage of livestock and its products was one of the issues raised by the complainant before the Interstate Commerce Commission, and though some evidence was adduced before the Commission to show that the cost of carrying livestock was greater than the cost of carrying the product, the Commission was not convinced by it, and in effect found that the cost of carrying the product was greater than the cost of carrying the livestock.

In the Circuit Court, appellees introduced further testimony to the effect that the cost of carrying the livestock was greater than the cost of carrying the product, and the Circuit Court found as a fact that this was true.

Trans., p. 177.

In the early part of its Report and Opinion in this case, the Commission, referring to a previous case involving relative rates on cattle and hogs and their products, said:

"The subject matter of the complaint in the Squire & Co. case supra was the rates exacted by the defendants for transporting cattle and hogs and their products from Chicago to Boston and other eastern points. After stating that livestock and its products were bought and sold in competition with each other in the markets and relating the circumstances surround-

ing their transportation, the Commission held that the different rates should be based upon *cost of carriage*, but as the record did not contain data from which such cost could be ascertained no order was made."

Trans., p. 32.

But in the present case, the Commission modified its holding in the Squire case to the extent that in reaching its conclusion, it did not rely *entirely* upon the "cost of carriage," but considered it as one of the elements entering into a determination as to what the relative adjustment of rates should be. In its Report and Opinion in this case, the Commission said:

"Although we think cost of transportation is a *very important element*, we do not consider it a controlling element in this case."

Trans., p. 44.

If it be true, as in effect found by the Commission, that the cost of transporting the product is greater than the cost of transporting the livestock, then the result of the application of the single factor of "cost of transportation," or "cost of carriage," as a test would be adverse to the present adjustment, whereby the rate on the product is made lower than the rate upon the live animal.

Appellees have shown by a preponderance of the evidence taken in the Circuit Court, and that Court has found that the cost of transporting the product is less than the cost of transporting the livestock.

Therefore tested by the single factor of the "cost of trans-

portation," or "cost of carriage," the present adjustment is proper, under the finding of the Circuit Court.

When we consider, however, that the main defense of appellees is that the present lower rates upon the products than upon the livestock are justified because of compelling competition, and that the defense could rest upon that ground alone; and when we further consider that competition might, under some circumstances, have resulted in equal rates on the animals and the products, while under other circumstances it might have resulted in lower rates upon the animals than upon the products, it is apparent that the fact that the theoretical rate-making would have produced a result substantially similar to that which competition for the carriage of the products has actually produced in this case, becomes a coincidence; and being a coincidence in their favor, appellees are entitled to avail and have availed themselves of the benefit of it.

To this extent only the "cost of transportation," or "cost of carriage," is of consequence from the standpoint of the appellees, in sustaining the present relative adjustment.

XV.

The Rates on Livestock to Chicago from Points Intermediate Between the Missouri River and Chicago.

The fifth paragraph of the complaint of the Chicago Livestock Exchange before the Commission in substance alleged that the rates charged for the transportation of the *product of livestock* from Kansas City, South St Joseph, South Omaha, Sioux City and South St. Paul to Chicago and points east thereof, and that the

rates charged for the transportation of *livestock* from said markets and *intermediate points* in Iowa, Missouri, Wisconsin and Minnesota to Chicago subjected the city of Chicago and the complainant to undue and unreasonable prejudice and disadvantage.

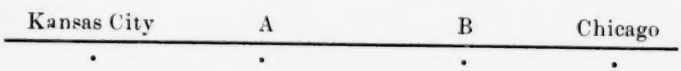
Ex. "A" to O. Bill, Trans., p. 10.

As regards shipments originating at any one of the Missouri River markets, such as Kansas City, it will be noted from the above that the alleged undue and unreasonable prejudice and disadvantage is predicated of the rate on the *product of livestock* from Kansas City to Chicago, as compared with the rate on the *livestock* from Kansas City to Chicago; that in each case the rate applies from Kansas City to Chicago, and that the rates compared therefore apply between the same points. Hence it is proper in considering the rates from the Missouri River to Chicago on the live animal and the product thereof to speak of them as "relative rates," since that is the term generally used where the matter under consideration is the relation of rates between different but kindred kinds of traffic between the same points of origin and destination.

The majority of "intermediate points" lying between the Missouri River and Chicago are local stations *at which no packing-houses are located;* and from which, consequently, no shipments of packing-house products are made. From such "intermediate stations" at which there are no packing-houses, there are no rates to which this litigation relates except the rates upon the live animals, and therefore no question of "relative rates" from such intermediate stations to Chicago arises.

The situation as to the rates from "intermediate stations" may be thus illustrated:

Diagram No. 5.



(Rate on product, 20 cts. per 100 lbs., Kansas City to Chicago.)

We will suppose "B" to be an "intermediate local station" near Chicago and that the rate upon the live animal from "B" to Chicago is so low that it is much less than the local rate on the live animal from "B" to Kansas City, plus the rate of 20 cents on the dressed product of the animal from Kansas City to Chicago. It is quite evident that in the case supposed it would be to the interest of shippers at "B" to have their shipments move to Chicago direct for slaughter, and not to Kansas City for slaughter and subsequent shipment of the product from Kansas City to Chicago. The existence of the 20-cent rate on the dressed products from Kansas City to Chicago therefore creates no prejudice whatever against Chicago, so far as shipments of animals from "B" to Chicago are concerned. We may therefore eliminate from consideration "B" and all similarly situated stations.

We will suppose "A" to be an "intermediate local station" more distant from Chicago, and that the rate upon the live animal direct from "A" to Chicago is sufficiently high to make it cheaper for the shipper at "A" to ship the live animal at the local rate in effect from "A" to Kansas City, and then ship the product of the animal from Kansas City to Chicago upon the rate of 20 cents per hundred pounds. In this instance a prejudice would exist against Chicago by reason of the 20-cent rate on the product; and the sole question is whether such prejudice is, in legal contemplation, undue or unreasonable. There are certain local stations on the lines of the various appellees immediately east of the Missouri River situated similarly to "A," and with these we may be said to be concerned.

It is proper to here explain that even the former rate of 23½ cents on the product, which existed prior to the Chicago Great Western contract, made it more advantageous to ship from near-by local stations east of the Missouri River, such as "A," into Kansas City and other Missouri River markets for slaughter; and that, speaking generally, with reference to the majority of such stations, the effect of the establishment of the rate of 20 cents was to increase the amount, in cents, of an advantage already existing. In other words, there existed under the previous rate of 23½ cents on the product from the Missouri River to Chicago an *absolute advantage* in shipping from the majority of such near-by stations into the Missouri River market for slaughter; and there is no showing made in the record, on behalf of appellant, as to whether the mere increasing of the advantage which was already absolute had any effect upon the movement from such near-by intermediate stations to the Missouri River markets and Chicago respectively.

Of course, at "intermediate points," *where packing-houses are located*, the question of "relative rates" upon the animals and the products thereof from such intermediate points to Chicago arises in the same manner that it arises at points located on the Missouri River, for the principles hereinbefore explained govern at such "intermediate points" quite as much as at the Missouri River. Such points, however, are few in number, nor is their business of magnitude.

Reference is made in the sixth paragraph of the complaint before the Commission to the decision of the Commission in the case of Board of Trade of the City of Chicago v. Chicago & Alton Railroad Co. et al., with regard to "*relative rates* on live hogs and hog product from Missouri River points and *intermediate points* in Iowa and Missouri to Chicago," from which it might be

inferred that the Commission had rendered a decision with respect to "relative rates" from "intermediate points" in general. Trans., p. 10.

It will be seen, however, by reference to said decision, 3 I C. Rep., p. 237, that the "intermediate points" involved in that case were packing-house points, from which points rates to Chicago were published both on the live animals and on the product; and that therefore the term "relative rates" was properly used with respect to such "intermediate points."

Aside therefore from the question of the reasonableness of the rates from "intermediate points" under the first section, the only question involved in this case as to "intermediate points," *at which there are no packing-houses*, is whether, taking into consideration the rates from such "intermediate points" upon the live animals shipped direct to Chicago, the rate of 20 cents on the product from the Missouri River to Chicago, in so far as it may have the effect of diverting the shipment of the animal for slaughter from Chicago to the Missouri River markets, creates an undue prejudice or disadvantage against Chicago, under Section 3 of the Act to Regulate Commerce.

The defense of the appellees is that the rates upon livestock from such "intermediate points" to Chicago are reasonable charges for the service performed; that the rate of 20 cents on the product from the Missouri River to Chicago is forced by competition; that it pays something more than the cost of the movement of the product traffic, and therefore does not entail a loss upon the carrier which must be recouped on other traffic.

ARGUMENT.

XVI.

The Rates in Controversy Are Not Violative of the First Section of the Act to Regulate Commerce.

Appellees concede that the rates upon live cattle and hogs are higher than the rates upon the dressed or prepared products of cattle and hogs; but they deny that the rates upon live cattle and hogs are unreasonably high in and of themselves; on the contrary they aver that those rates, as well as the rates upon the dressed or prepared products of cattle and hogs, are unreasonably low.

The first section of the Act to Regulate Commerce enacts that all charges, etc., "shall be reasonable and just."

24 U. S. Stat. at Large, p. 279.

The words "reasonable and just" as used in the first section, necessarily mean rates that are reasonable and just *per se*, or *in and of themselves;* as contradistinguished from the rates which are referred to in Sections 2, 3, and 4 of the act.

The phrase "just and reasonable *in and of themselves*" is used by this Court in its opinion in the case of E. T. V. & G. Ry. Co. v. I. C. C., 181 U. S., pp. 18, 19.

With reference to the first section of the act, the Commission, in its report and opinion, said:

"Complainant also introduced considerable evidence tending to show that the rates exacted by defendant for transporting live-

stock to Chicago from points in the States of Iowa, Missouri. Wisconsin and Minnesota are unreasonable *per se*, but the testimony upon that point is unsatisfactory and we do not feel justified in making a finding in relation thereto."

See Rep. & O., Ex. P to O. Bill, Trans., p. 41.

A few shippers of livestock testified in the Circuit Court that, the rates upon live cattle and hogs are, in their opinion, unreasonably high; but none of the railroad officers who were examined either before the Commission, or in the Circuit Court, testified that said rates are unreasonably high in and of themselves.

There was some testimony given by certain railroad officers which tended to show that the existing rates upon live cattle and hogs are too high *as compared with the rates upon the dressed or prepared products of cattle and hogs;* but that testimony, in fact amounted to little more than a theory as to what would be the proper relation of rates, if the cost of transportation were the sole factor in the determination of the question and other factors were left out of view. Even as a theory, however, the Circuit Court was of opinion that the conclusions reached by those witnesses were incorrectly predicated. Upon this point, the Circuit Court said:

"On the part of the Commission, Edward P. Ripley and his statistician, James Peabody, made comparative statements of the net results from the carriage of these different commodities, upon basis of average cost of all business, per gross ton mile, which is concurred in by the witness Tomlinson, who made further statements, which figures show that it is more expensive to the company to carry fresh meats and packing-house products than livestock; *but they did not consider all the burdens peculiar to livestock.*"

Trans., p. 177.

None of the witnesses testified that the rates upon live cattle and hogs, considered independently of the rates upon the dressed or prepared products of cattle and hogs, are unreasonably high.

The testimony upon this point in the Circuit Court, with respect to the rates on cattle and hogs from Missouri River points to Chicago, was, in substance, as follows:

The rates are reasonable in view of the service performed and the conditions under which they are made.
Crosby, Trans., p. 238.

They are the result of competition between carriers.
Crosby, Trans., p. 238.

They are the result of competition between markets.
Crosby, Trans., p. 238.
Hiland, Trans., p. 506.

The rates in controversy on cattle and hogs are too low.
Keepers, Trans., p. 399.
Tittemore, Trans., p. 569.
Gower, Trans., p. 720.

And but for competition would be higher than they are.
Keepers, Trans., p. 399.
Tittemore, Trans., p. 572.
Gower, Trans., p. 720.

With respect to the reasonableness of the rates on cattle and hogs from "intermediate points" to Chicago, the testimony in the Circuit Court was, in substance, as follows:

The rates upon cattle and hogs from intermediate points be-

tween the Missouri River and Chicago to Chicago are fixed by competition.

Keepers, Trans., p. 415.
McCullough, Trans., p. 953.

The local traffic is competitive owing to the proximity of competing lines of railway.

Tittemore, Trans., p. 579.

The distance from any local station in Iowa to the nearest competitive point does not exceed 15 or 20 miles.

Keepers, Trans., p. 415.

There has been no complaint from shippers of cattle in Iowa or elsewhere west of Chicago as to the reasonableness of rates or the relation between the rates on live stock and the product.

Keepers, Trans., p. 408.

There are thousands of people shipping livestock over the C. & N. W. Railway, without a complaint on a single car as to rates.

McCullough, Trans , p. 956.

The present rates on cattle and hogs from points in Iowa to Chicago are in some instances not equal to 50 per cent of the rates which were charged within the past 35 or 40 years.

Baird, Exhibits Nos. 1, 2 and 3, Trans., pp. 898, 899.
Calkins, Trans., p. 902.

The rates on livestock do not bear a just proportion in the contribution to the total revenue derived from the transportation of freight.

Hiland, Trans., p. 506.
Crosby, Trans., p. 243.

And Messrs. Ripley and Peabody, who testified generally as to the rates on behalf of appellant, stated that the rates upon live cattle and hogs do not pay their proportion of the total operating cost, even though interest and taxes be excluded from such cost.

Ripley, Trans., pp. 1104, 1105, 1106.
Exhibits "A," "B" and "C."
Peabody, Trans., pp. 1222, 1223.

XVII.

Under the First Section of the Act, the Burden of Proof Rests Upon the Appellant.

In the case of Harding v. C. St. P. M. & O. R. Co., 1 I. C. Rep., p. 375, and in the case of Brewer & Hanleiter v. L. & N. R. R. Co., 7 I. C. Rep., p. 234, the Commission held that on a petition charging the exaction of *unreasonable* rates, the burden of proof is on the petitioner to sustain the charges by evidence which shows with reasonable certainty that they are in substance true.

The Commi-sion in its Report and Opinion in the case at bar in effect found that the Chicago Live Stock Exchange had failed to show in that tribunal that the rates upon live cattle and hogs are unreasonable *per se;* and I submit that the testimony taken before the Commission and in the Circuit Court, so far from showing that said rates are unreasonably high, shows that they are, in fact, unreasonably low.

XVIII.

The Order of the Commission Concedes, in Effect, that the Rates Upon Live Cattle and Hogs are Reasonably Low in and of Themselves.

The order of the Commission prohibits appellees from charging higher rates upon live cattle and hogs than the rates which they may contemporaneously charge upon the dressed or prepared products of cattle and hogs.

Appellant concedes that if the appellees can increase the rates upon the dressed or prepared products of cattle and hogs so as to make them as high as the present rates upon live cattle and hogs, the appellees may lawfully continue to charge the present rates upon live cattle and hogs; and that to do so will not violate said order.

See Exhibit Q to O. Bill, Trans., pp. 48, 49.

In the case of E. T. V. & G. Ry. Co. v. I. C. C., 181 U. S., p. 23, this Court said: "A decree which ordered the carrier to desist from charging a greater compensation for the lesser than for the longer haul, would be in no way responsive to the conclusion that the rate for a lesser distance was unreasonable in and of itself. Such a decree *would in effect authorize the carrier to continue to charge at its election a rate which was in itself unreasonable to the shorter point.*"

See also 190 U. S., p. 284, I. C. C. v. L. & N. R. R. Co.

To authorize the appellees to continue to charge the present rates upon live cattle and live hogs provided the appellees secure an increase in the rates upon the dressed or prepared products of cattle and hogs is inconsistent with the theory that the present rates upon live cattle and hogs are unjust or unreasonable *in and of themselves.*

XIX.

Appellees' Rates Upon Live Cattle and Hogs are as Low as the Rates Charged by Other Railroads in Other Parts of the United States for Similar Distances.

Mr. O. P. Anderson and other witnesses compiled elaborate comparisons between the rates charged by appellees upon live cattle and live hogs, with the rates charged upon the same commodities for similar distances, by other railroads, in other sections of the United States, and the result of such comparisons is very favorable to the appellees.

Anderson's Test., Trans., p. 915 et seq., and Exhibit No. 1 to Anderson's Test.

Keeper's Test., Trans., p. 407, and Ex. No. 3¼ to Keeper's Test.

Gorman Test., Trans., pp. 969–972, and Ex. No. 1 to Gorman's Test.

In the Danville case, Judge McDowell, in considering the testimony as to the reasonableness of the Danville rates, was led to the conclusion "that the most satisfactory test to be applied in this case (*i. e.*, the Danville case) is to compare the Danville rates with those in force at numerous other cities and towns, in the South, where the circumstances are, as nearly as may be, similar to those at Danville. This has been done by numerous witnesses for the defense. The rates to and from a great number of towns and cities in the South—some larger and some smaller, some of more, and some of less commercial importance, than Danville; some inland and some having water as well as rail transportation; some being on only one railroad and some having more than one road—have been shown. The result of compari-

son between these rates and the Danville rates is the conclusion that the latter compare favorably with the former."

117 Fed. Rep., p. 745, I. C. C. v. Southern Ry. Co.; affirmed by the Court of Appeals, 122 Fed. Rep., p. 800.

This Court quotes approvingly the following language:

"The law makes it the duty of every common carrier to receive and carry all goods, . . . and authorizes a reasonable reward to be charged for the service. The amount to be paid is, in a measure, subject to the agreement of the parties; but when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, *which is to be ascertained by the amount commonly or customarily paid for other like service.*"

183 U. S., p. 98, Cotting v. Kansas C. Stockyards Company.

XX.

The Second Section of the Act to Regulate Commerce Has No Application to This Case

The second section of the Act to Regulate Commerce enacts:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them *a like and contemporaneous service* in the transportation of *a like kind of traffic*, under substantially similar circumstances and conditions, such common

carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

24 U. S. Stat. at Large, pp. 379, 380.

The second section was construed by this Court, in Wight v. U. S., 167 U. S., pp. 516, 518. In that case a railroad company charged one shipper of beer a higher rate than another shipper of beer for carriage from the same place of shipment (Cincinnati), to the same place of destination (Pittsburg). The Court said that it was the purpose of *the second section* to enforce equality between shippers, and to prohibit "any rebate or other device by which two shippers, shipping over the same line, *the same distance*, under the same circumstances of carriage, are compelled to pay different prices therefor."

It will be noticed that in order for the second section to apply there must be "a like service" and "a like kind of traffic." In the Wight case, the railroad company not only transported the freight "over the same line," and for "the same distance," but it also transported for each of the shippers "a like kind of traffic," viz., beer.

In the case at bar there is no pretense that the appellees charge one shipper of live cattle and hogs any more or less than they charge any other shipper of live cattle and hogs over the same line and for the same distance.

Neither is there any pretense that appellees charge one shipper of the dressed or prepared products of cattle and hogs any more or less than they charge any other shipper of dressed or prepared products of cattle and hogs, over the same line for the same distance.

The only complaint is that appellees charge a shipper of live cattle and hogs higher rates than they charge a shipper of the

dressed or prepared products of cattle and hogs; and a complete answer to that complaint is that the traffic in live cattle and hogs is not "like" the traffic in dressed or prepared products of cattle and hogs; nor is the service rendered in the transportation of live cattle and hogs "like" the service rendered in the transportation of the dressed or prepared products of cattle and hogs. It might as well be said that the traffic and the service rendered in transporting a live passenger in a sleeping car is "like" the traffic, and the service rendered, in transporting a corpse in a baggage car.

I am not now referring to the question as to which of those services cost most to the carrier, or is of most value to the shipper. My only contention, at this point, is that without regard to either cost, or value, the service and the traffic in the one case is not "like" the service and traffic in the other.

The service rendered in the transportation of live cattle and hogs requires the use of open and well ventilated cars; it requires that persons accompany the cattle and hogs to take care of them en route; it requires that the cattle and hogs be fed and watered and rested en route; it requires that stockyards and stockpens be provided for their reception at point of shipment, and for their delivery at the point of destination; and it requires prompt delivery to meet special market days, and hours.

The service rendered in the transportation of the dressed or prepared products of cattle and hogs requires the use of refrigerator cars. It requires that ice and salt be carried in order to maintain a proper degree of refrigeration; but it does not require that persons accompany the products to take care of them en route; nor does it require that the products be fed, or watered, or rested en route; nor does it require that stockyards or stockpens, or other depots be provided either for the reception of the products at point of shipment or for the delivery of the products at point of destination (the uncontradicted evidence being that the products are loaded by the shippers at their own

packing-houses, and are unloaded by the shippers or consignees at the point of destination, into houses not furnished by the carrier; nor does the service require prompt delivery to meet special market days and hours.)

As, then, there is neither a "like service" nor "a like kind of traffic" the second section has no application.

XXI.

The Third Section of the Act to Regulate Commerce Prohibits Only Such Preferences as Are Unjust or Unreasonable

The third section of the Act to Regulate Commerce was modeled upon the second section of the English Railway and Canal Traffic Act of 1854, and upon Section 11 of the English Railway and Canal Traffic Act of 1873. For the convenience of the Court, I print in parallel columns so much of said sections as are material for the present purpose:

Undue Preference Clause.	Undue Preference Clause.
English Acts	*American Act*
Sec. 2. Railway and Canal Traffic Act, 1854.—1 *Nev. & Mac., p.* 2.	Sec. 3. Act to Regulate Commerce.
Sec. 11. Railway and Canal Traffic Act, 1873.—1 *Nev & Mac. p.* 11. . . . . And no such company shall make or give any *undue* or *unreasonable* preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever. —1 *Nev. & Mac., pp.* 2–11.	That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any *undue or unreasonable* preference or advantage to any particular person, company, *firm, corporation,* or *locality,* or any *particular description of traffic,* in any respect whatsoever, or to subject any particular person, company, *firm, corporation,* or *locality,* or any *particular description of traffic* to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.—24 *U. S. Stat. at Large, p.* 380.

The Court will notice that the only difference between the English acts and the third section of the American act is that the latter uses the words "firm, corporation or locality," which are not expressly specified in the English acts.

In Section 1 of the U. S. Revised Statutes it is provided that in determining the meaning of any act of Congress passed subsequent to February 25, 1871, "words importing the singular number may extend and be applied to several persons or things;" and the word "'persons' may extend and be applied to partnerships and corporations."

As the words "firm" and "corporation" used in the third section of the American act are, by statutory definition, included in the word "person," their express specification in the third section adds nothing to its legal effect.

And as it is absolutely impossible to conceive of a prejudice to a "locality," as separate and distinct from the "persons" who reside at such "locality," that word also is mere tautology.

It is also absolutely impossible to conceive of a prejudice to "any particular description of traffic" as separate and distinct from the "persons" who engage in such traffic.

In the case of Interstate Commerce Commission v. Baltimore & Ohio Railroad Company, Mr. Justice Brown, speaking for this Court, said:

"It is not all discriminations or preferences that fall within the inhibition of the statute; *only such as are unjust or unreasonable.*" . . . "Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."

145 U. S., pp. 276, 277, I. C. C. v. B. & O. R. R.

In the case of Interstate Commerce Commission v. Alabama Midland Railway Co., Judge Bruce said:

"The words 'any undue or unreasonable preference or advantage' plainly imply that every preference or advantage is not condemned, *but such, only, as are undue or unreasonable.*"

69 Fed. Rep., pp. 231, 232.

In the case of the Commercial Club of Omaha v. Chicago & N. R. Co., decided November 18, 1897, the Commission, speaking through Commissioner Knapp, said:

"It must be remembered that not every inequality in rates constitutes a violation of the law. *Discrimination is forbidden only when it is unjust. Preferences and prejudices are not prohibited unless they are undue.* The language of the statute implies that there may be discriminations which are not unjust and preferences which are not undue."

7 I. C. Rep., p. 404.

It goes without saying that where lower rates are charged to one "particular description of traffic" than to another "like kind of traffic" and those traffics are competitors in a common territory, such disparity of rates constitutes a preference in favor of the one and a prejudice or discrimination as against the other.

But the question still remains whether the preference, or prejudice, or discrimination, is "*undue or unjust.*"

XXII.

The Cases Decided by this Court in which the Third Section was Involved.

In the case of the T. & P. Ry. v. I. C. C., 162 U. S., p. 127 (known as the Import Case), it appeared that the Texas & Pacific Railway Company and the Southern Pacific Company, in connection with certain steamships, participated in through rates from Liverpool to San Francisco via New Orleans; and that they accepted as their proportion or share of such through rates for the transportation of through traffic from New Orleans to San Francisco, a materially lower sum than they charged for the transportation of the same kind of traffic originating at New Orleans and carried by them to San Francisco.

In other words, the "particular description of traffic" which originated at Liverpool was carried by said railway companies from New Orleans to San Francisco for a materially lower sum than a "like kind of traffic" originating at New Orleans; notwithstanding the fact that the traffic originating at Liverpool, and the traffic originating at New Orleans, was carried from New Orleans to San Francisco over the same line, in the same direction; and perhaps in the same train, and even in the same car.

There was manifestly a preference in favor of the traffic originating at Liverpool, and a prejudice against the traffic originating at New Orleans; and yet it was held by this Court that such preference and prejudice were not "undue or unreasonable." It appeared that the through rates from Liverpool to San Francisco were, in effect, fixed and controlled by the competition of sailing vessels for the entire distance; by steamships and sailing vessels, in connection with railroads across the Isthmus of

Panama; and by steamships and sailing vessels in connection with the Canadian railways; and that if the Texas & Pacific Railway Company and the Southern Pacific Company should be prevented from participating in said traffic, such traffic would move via the other competing routes and lines; that such diversion of the traffic to said competing lines would be of no benefit to New Orleans; that such diversion would be of no benefit to any one except to the competing lines; and that its only effect, so far as the parties before the court were concerned, would be to deprive the Texas & Pacific Railway Company and the Southern Pacific Company of such profits as they might otherwise have realized from their proportions or shares of said through rates.

This Court said:

"The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are not questions of law but of fact. *The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act.* Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

162 U. S., pp. 219, 220.

The Court held that as the through rates from Liverpool to

New Orleans were forced upon the Texas & Pacific Railway Company and the Southern Pacific Company by the competition above referred to, the preference in favor of the traffic originating at Liverpool, and the prejudice against the traffic originating at New Orleans were not "undue or unreasonable," within the meaning of the third section. It is apparent that the preference in the case at bar in favor of the product traffic, and the prejudice against the live stock traffic, are as much the result of competition as was the preference and prejudice which existed in the "Import" case.

In the case of the I. C. C. v. The Alabama Midland Ry., 168 U. S. p. 144, it appeared that the Alabama Midland Railway and other connecting railway lines, participated in through rates from New York, via Troy, Ala., to Montgomery, Ala.; and that such through rates to Montgomery, Ala., were materially less than the through rates to Troy, although Troy was nearer than Montgomery to New York by 52 miles. In fact the through rates to Troy were higher than the through rates to Montgomery, by the full amount of the local rate from Montgomery back to Troy.

In other words, the "particular description of traffic" which was destined to Montgomery was carried by said railroad company from New York to Montgomery for a materially lower sum than a "like kind of traffic" destined to Troy; notwithstanding the fact that the traffic destined to Montgomery, and the traffic destined to Troy, was carried from New York to Troy over the same line, in the same direction, and perhaps in the same train, and even in the same car.

There was manifestly a preference in favor of the traffic destined to Montgomery, and a prejudice against the traffic destined to Troy; and yet it was held by this Court that such preference and prejudice were not "undue or unreasonable." It appeared

that the through rates from New York to Montgomery were, in effect, fixed and controlled by the competition of rival lines which did not pass through Troy; and that if the Alabama Midland Railway Co. should be prevented from participating in said traffic, such traffic would move via said rival lines; that such diversion of said traffic to said rival lines would be of no benefit to Troy, nor to any one else, except the said rival lines; and that its only effect, so far as the parties before the Court were concerned, would be to deprive the Alabama Midland Railway Co. and its connections of such profits as they might otherwise have realized from their proportions or shares of the through rates from New York to Montgomery.

This Court said: "In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable."

168 U. S., p. 164.

The Court held that as the through rates from New York, etc., to Montgomery were forced upon the Alabama Midland Railway and its connections by the competition above referred to, the preference in favor of the traffic destined to Montgomery, and the prejudice against the traffic destined to Troy, were not "undue or unreasonable" within the meaning of the third section; and it is apparent that the preference in the case at bar, in favor of the product traffic, and the prejudice against the live-stock traffic, are as much the result of competition, as was the preference and prejudice which existed in the "Alabama Midland" case.

In the case of the L. & N. R. R. Co. v. Behlmer, 175 U. S., p. 648, it appeared that the several defendant carriers participated in through rates on hay from Memphis, Tenn., via Summerville, to Charleston, S. C.; and that such through rates to Charleston were materially less than the through rates from Memphis to Summerville, although Summerville was nearer than Charleston to Memphis by about 20 miles. In fact the through rates on hay from Memphis to Summerville were higher than the through rates on hay from Memphis to Charleston, by the full amount of the local rate from Charleston back to Summerville. In other words, the "particular description of traffic" (i. e. hay) which was destined to Charleston, was carried by the defendant railroad companies from Memphis to Charleston for a materially lower sum than a "like kind of traffic" (i. e hay) destined to Summerville; notwithstanding the fact that the hay destined to Charleston, and the hay destined to Summerville, were carried from Memphis to Summerville over the same line, in the same direction, and perhaps in the same train, and even in the same car.

There was manifestly a preference in favor of the hay traffic destined to Charleston, and a prejudice against the hay traffic destined to Summerville; and yet it was held by this Court that such preference and prejudice were not "undue or unreasonable." It appeared that the through rates from Memphis to Charleston were, in effect, fixed and controlled by the competition of rival lines which did not pass through Summerville; and that if the defendant railroad companies should be prevented from participating in said traffic, such traffic would move via said rival lines; that such diversion of said traffic to said rival lines would be of no benefit to Summerville, nor to anyone else, except the said rival lines; and that its only effect, so far as the parties before the Court were concerned, would be to deprive the defendant railroad companies of such profits as they might otherwise have realized from their proportions or shares of the through rates on hay from Memphis to Charleston.

This Court said: "That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights, which would otherwise go by other competitive routes, are or are not undue or unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

175 U. S., p. 665.

This Court held that as the through rates on hay from Memphis to Charleston were forced upon the defendant railroad companies by the competition above referred to, the preference in favor of the hay traffic destined to Charleston and the prejudice against the hay traffic destined to Summerville were not "undue or unreasonable" within the meaning of the third section; and it is apparent that the preference in the case at bar in favor of the product traffic, and the prejudice against the livestock traffic, are as much the result of competition as was the preference and prejudice which existed in the "Behimer" case.

In the case of E. T. V. & G. Ry. Co. v. I. C. C., 181 U. S., p. 1, it appeared that the several defendant carriers participated in through rates on certain traffic from New York via Chattanooga to Nashville, Tenn.; and that such through rates to Nashville were materially less than the through rates from New York to Chattanooga although Chattanooga was, by defendants' lines, nearer than Nashville to New York by about 150 miles. In fact the through rates on said traffic from New York to Chattanooga were higher than the through rates on said traffic from New York to Nashville (in some instances), by the full amount of the local rate from Nashville back to Chattanooga. In other

words, the "particular description of traffic" which was destined to Nashville was carried by the defendant railroad companies from New York to Nashville for a materially lower sum than a "like kind of traffic" destined to Chattanooga; notwithstanding the fact that the traffic destined to Nashville and the traffic destined to Chattanooga were carried from New York to Chattanooga over the same line, in the same direction, and perhaps in the same train, and even in the same car.

There was manifestly a preference in favor of the traffic destined to Nashville and a prejudice against the traffic destined to Chattanooga; and yet it was held by this Court that such preference and prejudice were not "undue or unreasonable." It appeared that the through rates from New York to Nashville were, in effect, fixed and controlled by the competition of rival lines which did not pass through Chattanooga; and that if the defendant railroad companies should be prevented from participating in said traffic, such traffic would move via said rival lines; that such diversion of said traffic to said rival lines would be of no benefit to Chattanooga, nor to any one else, except the said rival lines; and that its only effect, so far as the parties before the Court were concerned, would be to deprive the defendant railroad companies of such profits as they might otherwise have realized from their proportions or shares of the through rates from New York to Nashville.

This Court said:

"Indeed, the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville (the longer distance point) or unjust discrimination against Chattanooga (the shorter distance point) arose merely from the act of the carriers in meeting the competition existing at Nashville. The Commission found that if the defendant carriers had not adjusted their rates to meet the

competitive conditions at Nashville, the only consequence would have been *to deflect the traffic at the reduced rates over other lines* From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, *the preference in favor of Nashville* growing out of the *conditions there existing would have remained in force and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position* if the long and short haul clause had not been brought into play." . . . . "To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, *without anywise benefiting the public*"

181 U. S., pp. 19, 20.

This Court further said:

"In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply.

"The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the *voluntary* and *wrongful* act of the carriers complained of as having given undue preference and does not relate to acts *the result of conditions wholly beyond the control of such carriers.* To otherwise construe the statute would involve a departure from its plain language and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination."

181 U. S., p. 18

This Court held that as the through rates from New York to Nashville were forced upon the defendant railroad companies by the competition above referred to, the preference in favor of the traffic destined to Nashville and the prejudice against the traffic destined to Chattanooga were not undue or unreasonable within the meaning of the third section; and it is apparent that the preference in the case at bar in favor of the product traffic, and the prejudice against the livestock traffic, are as much the result of competition as was the preference and prejudice which existed in the "Chattanooga" case.

In the case of the I. C. C. v. L. & N. R. R., 190 U. S., p. 273, the complaint alleged in substance that the defendant railroad companies charged certain rates upon certain commodities from New Orleans, La., to LaGrange, Ga., which were unjust and unreasonable in themselves, "and relatively unjust and unreasonable as compared with lower rates charged by defendants for carrying the same commodities over longer distances from New

Orleans, through LaGrange, to Hogansville, Newnan, Palmetto and Fairburn, Ga., and other localities;" that said relative rates subject merchants and dealers in said commodities "to undue and unreasonable prejudice and disadvantage, and give undue and unreasonable preference and advantage to merchants and dealers at Hogansville, Newnan, Palmetto, Fairburn and other localities and traffic consigned thereto."

190 U. S., pp. 274, 275.

It appeared that the through rates from New Orleans to LaGrange on said commodities were materially less than the through rates from New Orleans to Hogansville, Newnan, Palmetto, Fairburn and Atlanta, although LaGrange was, by defendants' lines, nearer than said other stations to New Orleans. In fact the through rates on said commodities from New Orleans to LaGrange were higher than the through rates on said commodities from New Orleans to Atlanta, Ga. (in some instances) by the full amount of the local rate from Atlanta back to LaGrange. In other words the "particular description of traffic" which was destined to Atlanta, was carried by the defendant railroad companies from New Orleans to Atlanta for a materially lower sum than a "like kind of traffic" destined to LaGrange; notwithstanding the fact that the traffic destined to Atlanta, and the traffic destined to LaGrange were carried from New Orleans to LaGrange over the same line, in the same direction, and perhaps in the same train, and even in the same car.

There was manifestly a preference in favor of the traffic destined to Atlanta, Hogansville, Newnan, Palmetto and Fairburn, and a prejudice against the traffic destined to LaGrange; and yet it was held by this Court that such preference and prejudice were not "undue or unreasonable." It appeared that the through rates from New Orleans to Atlanta were, in effect, fixed and controlled by the competition of rival lines which did not

pass through LaGrange; and that if the defendant railroad companies should be prevented from participating in said traffic such traffic would move via said rival lines; that such diversion of said traffic to said rival lines would be of no benefit to LaGrange, nor to any one else, except the said rival lines; and that its only effect, so far as the parties before the Court were concerned, would be to deprive the defendant railroad companies of such profits as they might otherwise have realized from their proportion or shares of the through rates from New Orleans to Atlanta.

This Court held that as the through rates from New Orleans to Atlanta were forced upon the defendant railroad companies by the competition above referred to, the preference in favor of the traffic destined to Atlanta, and the prejudice against the traffic destined to LaGrange, were not "undue or unreasonable" within the meaning of the third section; and it is apparent that the preference in the case at bar in favor of the product traffic, and the prejudice against the livestock traffic are as much the result of competition as was the preference and prejudice which existed in the LaGrange case.

The Court will notice that while all of the cases cited in this section of my argument involved the long and short haul clause contained in the fourth section of the Act to Regulate Commerce, they also involved the third section of said act. The Court will also notice that they involved not only the question of preference or prejudice to different "localities," but also the preference or prejudice to "particular descriptions of traffic," and the preference or prejudice to the "persons, companies, firms and corporations" engaged in such traffic at the several localities referred to in said cases. The Court will further notice, that everything said by it in reference to what constitutes undue or unreasonable preference or prejudice, applies as well to "par-

ticular descriptions of traffic" as it does to particular "localities," or to "particular persons, companies, firms and corporations."

The suggestion of appellants that the words "undue or unreasonable," have a different meaning when applied to "persons, companies, firms, corporations or particular descriptions of traffic" from what they have when applied to "localities" assumes that Congress intended to attach to the words "undue or unreasonable" several different and distinct meanings in the same section of the act.

The words "under substantially similar circumstances and conditions" occur in the second section as well as in the fourth section of the act, and in one of the first cases in which the Commission delivered a written opinion, Chairman Cooley said: "It is not at all likely that Congress would deliberately, in the same act and when dealing with the same general subject, make use of a phrase which was not only carefully chosen and peculiar, but also controlling, in such different senses that its effect as used in one place upon the conduct of the parties who were to be regulated and controlled by it would be essentially different from what it was as used in another."

1 Ann. Rep. I. C. C., p 67, in the matter of the petitions of the L. & N. R. R. Co. and others.

In the case at bar, instead of asking the Court to hold that the words "undue or unreasonable" have different senses in two different sections of the act, the Court is asked to go further, and hold that they have different senses in the same section, and that what does not constitute undue or unreasonable preference or prejudice in regard to different "localities" may constitute undue or unreasonable preference or prejudice in regard to different "persons, companies, firms, corporations or particular descriptions of traffic."

XXIII.

We Do Not Contend that the Mere Fa t of Competition Relieves the Carrier from the Restraints of the Third and Fourth Sections.

Mr. Shaver, of counsel for appellant, in his printed argument in the Circuit Court quotes an extract from the opinion of this Court in the case of the I. C. C. v. Alabama Midland Ry. Co., 168 U. S., p. 167, as follows:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking the matter into consideration."

The same extract was relied upon by the Commission in the "Chattanooga case," and is quoted by this Court in its opinion in that case; and this Court held that it had no such meaning as was attributed to it by counsel for the Commission.

181 U. S., pp. 15, 16, 17, E. T. V. & G. Ry. Co. v. I. C. C.

While the mere fact that competition, no matter what its character or extent, does not necessarily relieve the carrier from

the restraints of the third and fourth sections, yet where the competition is actual, and so forceful as to affect rates, it does relieve the carrier from the restraints of said sections.

See the cases heretofore cited in Section XXII.

Mr. Shaver, of counsel for appellant, in his printed argument in the court below, quotes an extract from the opinion of this Court in the case of L. & N. R. R. Co. v. Behlmer, 175 U. S., p. 674, as follows:

"It follows that while the carrier may take into consideration the existence of competition as the producing cause of the dissimilar circumstances and conditions, his right to do so is governed by the following principles: First, the absolute command of the statute that all rates shall be just and reasonable and that no undue discrimination be brought about" . . . .

Said extract quoted by Mr. Shaver is only a portion of a paragraph, and the entire paragraph was relied upon by the Commission in the "Chattanooga case." Said paragraph was quoted by this Court in that case; and this Court held that it had no such meaning as was attributed to it by counsel for the Commission.

181 U. S., pp. 15, 16, 17, E. T. V. & G. Ry. Co. v. I. C. C.

I concede that the right of a carrier to take into consideration the existence of competition is governed by the "command of the statute that all rates shall be just and reasonable and that no undue discrimination be brought about"

But I have shown in Sections XVI, XVIII and XIX that appellees' rates upon livestock are just and reasonable; and I have shown in Section XXII that the discrimination in favor of livestock product is not "undue."

XXIV.

The Contention of Appellant's Counsel that the Chicago Great Western Company had No Right to Inaugurate Competition by Making the Contract of August 8, 1902.

The Chicago Great Western Company did not inaugurate competition on August 8, 1902. Competition in the carriage of the products of live stock from Missouri River points to Chicago has existed from the passage of the Act to Regulate Commerce down to the present time. Prior to March 24-25, 1902, when the restraining orders or temporary injunctions were granted by Judge Grosscup, the competition consisted chiefly in secretly cutting the published rates.

After the granting of said restraining orders or injunctions, the carriers ceased the secret cutting of published rates; and on August 8, 1902, when the contract was made by the Great Western Company, the competition consisted in the efforts of each of the carriers to solicit the traffic, and to render the best and quickest service, in its transportation.

The error of appellant's counsel, on this point, consists in assuming *that competition cannot exist unless there be a cutting of rates* either openly or secretly. On the contrary, competition may be as severe, and as costly to the carrier, and as beneficial to the public, when maintained at open published rates, as though it were maintained by reducing rates.

To illustrate: If a carrier by providing costly locomotives and cars, and by running its trains at an extraordinary high rate of speed, and by improving its roadbed and superstructure, expends an extra amount of money which in the aggregate equals 2 cents per 100 pounds on the freight traffic carried by it, and by means of such expenditures it is enabled to so increase its speed

and improve its service, as to deprive its competitor of the latter's proportion of the competitive traffic, such competition in the way of increasing speed and improving service, is as costly to such carrier as if said carrier had made a reduction in its rates of 2 cents per 100 pounds; and it is as effectual in securing the traffic.

Again, competition may be exceedingly severe, though maintained at open published rates, and though neither of the competing carriers may make any extraordinary expenditures in the improvement of its service.

To illustrate: I will take an actual case. The Central of Georgia Railway owns a line of road from Atlanta via Macon and Ft. Valley to Columbus, Georgia, a distance of 203 miles, as shown by the following diagram No. 6.

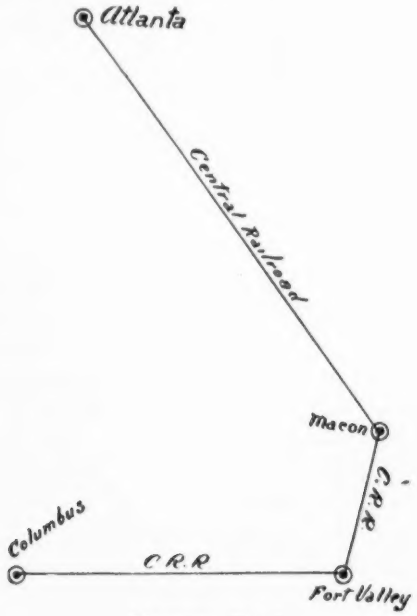


Diagram No. 6

For a number of years the Central of Georgia Railway was the most direct route between Atlanta and Columbus, and the one usually employed in the transportation of freight between those cities. As the rates charged by that company between Atlanta and Columbus were made by the Georgia State Railroad Commission they were at least reasonably low, and were so regarded by the shipping public. Afterwards a railroad was constructed from Atlanta via Williamson to Columbus, a distance of only 117 miles, as against 203 miles via the old line of the Central. Both the old and new lines are shown on the following diagram No. 7. The new line is owned by the Southern Railway.

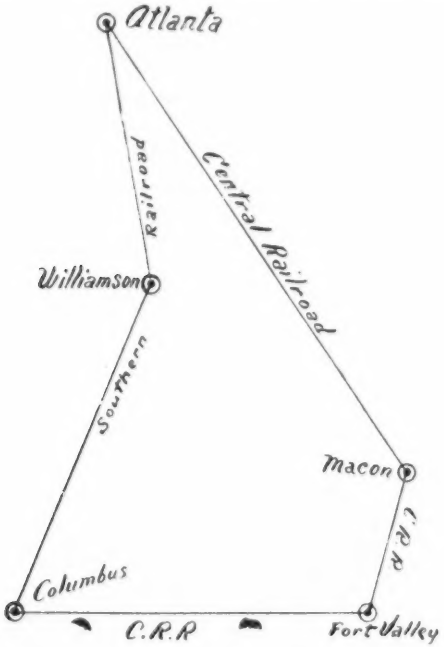


Diagram No. 7

It is obvious that upon the completion of the new line its Traffic Manager would willingly accept for transportation be-

tween Atlanta and Columbus—a distance of only 117 miles—the rates which the old line had been theretofore charging for a distance of 203 miles; and it is equally evident that the traffic between Atlanta and Columbus would be entirely diverted from the old line to the new, so long as both lines should maintain the same rates between Atlanta and Columbus; because no one would ship by a line 203 miles long when he could obtain the same rate by another line only 117 miles long.

The old line must therefore do one of three things. It must either increase its speed and improve its service; or, reduce the rates between Atlanta and Columbus; or, abandon all of the Atlanta-Columbus traffic to the new line.

Under the cases decided by the Supreme Court, commented upon in Section XXII of this argument, the old line could reduce the rates between Atlanta and Columbus, in order to secure or retain its proportion of the Atlanta-Columbus traffic, as against the new line, without being compelled to reduce the rates to or from the shorter distance stations, located on the old line between Atlanta and Columbus.

Such shorter distance stations might make precisely the same argument as is made by complainant in this case, viz.: that the old line inaugurated the competition by reducing the rates between Atlanta and Columbus, and thereby disturbed the relation which previously existed between the rates to and from the shorter distance stations on said line. But the all-sufficient answer would be, that though the old line inaugurated a reduction in the rates between Atlanta and Columbus, it did not do so voluntarily, but was forced to do so by reason of the competition of the new and shorter line; that the reduction of the rates by the old line, instead of inaugurating the competition, was the result of the competition inaugurated by the construction of the new line.

And so, in the case at bar, the Great Western Company, though it inaugurated a reduction of rates on livestock products, by making the contract of August 8, 1902, it did not inaugurate the competition in the transportation of those products. On the contrary, said reduction was the *result* of the competition *then existing*, and it was forced upon said company by the fact that its competitors were, under the then existing rates, securing more than their proportion of the competitive traffic; and if the Great Western had not made said reduction, it would have been forced to abandon a portion of its share of the competitive traffic to its rivals.

It is not explicitly explained in the testimony why the Great Western Company was not getting its proportion of the competitive traffic in the products of livestock. But it was, as hereinbefore shown in Sections XII and XIII, under the disability of having the longer line from Kansas City and St. Joseph to Chicago and therefore unable to render as speedy and efficient service as its rivals., while from Omaha it was a newly constructed line with no established patronage. It is quite usual in this country for one of several competing lines to be at a physical disadvantage by reason of its being the longer line, or having heavier grades and curves than its competitors, or of being a new line. And when it finds that it is unable to secure its proportion of the competitive traffic at the rates charged by its competitors, it reduces its own rates somewhat below those charged by its competitors; and its right to do so is well recognized in this country.

All of the water lines, as well as the rail and water lines, owing to their physical disability, insist upon charging rates which are less than those charged by the all-rail lines, between the same competitive points.

The differences between the rates charged by lines laboring

under disabilities, and the rates charged by their stronger competitors, are known in railroad parlance as "differentials." So far from such differentials inaugurating competition, they are the direct result of a previously existing competition; and they never would have been adopted by the lines laboring under disability had it not been for the fact that the previously existing competition was so severe that it was impossible for them to secure their proportion of the competitive traffic, so long as they charged as high rates as were charged by their stronger competitors.

It is not material to inquire whether President Stickney of the Great Western Company was correct in supposing that his company, on August 8, 1902, was not securing its due proportion of the competitive product traffic; nor is it material to inquire whether he was justified in desiring to secure a greater proportion of said traffic.

Even in the days when the pooling of traffic was not prohibited, it was always found to be extremely difficult for competing lines to agree with each other as to what their respective proportions of the competitive traffic should be.

As the pooling of traffic is now prohibited by the fifth section of the Act to Regulate Commerce, carriers cannot by agreement between them settle the proportions of the competitive traffic to which they are respectively entitled. Each line therefore is, by the law, required to judge for itself as to what its proportion of the competitive traffic should be; and it is perfectly natural that, under such law, each line should, to some extent, overestimate its own proportion. It is of the very essence of that competition, the suppression of which is prohibited by the fifth section, that competing carriers shall determine for themselves to what proportions of the competitive traffic they are entitled; and then to attempt to secure that proportion, either by a public reduction of the existing rates, or by improving their speed and service.

XXV.

The Contention that the Chicago Great Western Company Had No Right to Rely Upon the Mere Possibility of Competition by the Other Lines.

Appellant's counsel contended in oral argument in the Circuit Court that as there had been no cutting of rates from March 24-25, 1902, to August 8, 1902, when the contract was made by the Chicago Great Western Company, that company had no right to rely upon the mere possibility of its rivals cutting the rates in the future.

Counsel referred to the following extract from the opinion of this Court in the LaGrange case, viz.:

"In the report of the Commission, a suggestion is found that LaGrange should be entitled to the same rate as Atlanta, because if the carriers concerned in this case in connection with other carriers reaching LaGrange chose to do so, they might bring about competition by the way of a line between Macon and LaGrange which would be equivalent to the competitive conditions existing at Atlanta. We are unable, however, to follow the suggestion. To adopt it would amount to this: that the substantial dissimilarity of circumstances and conditions provided by the Act to Regulate Commerce would depend, not as has been repeatedly held, upon a real and substantial competition at a particular point, affecting rates, but upon the mere possibility of the arising of such competition. This would destroy the whole effect of the act and cause every case where competition was involved to depend not upon the fact of its existence as affecting rates, but upon the possibility of its arising What the fourth section of the Act to Regulate Commerce has reference to is an

actual dissimilarity of circumstances and conditions, not a conjectural one."

190 U. S., 282, 283, I. C. C. v. L. & N. R. R. Co.

I have shown in Section XXIV of this argument that on August 8, 1902, when the contract was made by the Great Western Company, there was actually existing competition in the transportation of live-stock products between the Missouri River points and Chicago, and that said existing competition was such as to actually affect rates. In fact, said competition was such as to compel the Great Western Company to reduce its rates on said products, or abandon a portion of its share of said products to its rivals.

The case at bar therefore is not one of the "mere possibility of competition arising," but it is one where "competition affecting rates" actually existed.

XXVI.

The Contention That the Competition Prior to the Injunction Was Illegal, and Therefore Cannot Be Relied Upon by Appellees.

I do not concede the abstract proposition that a railroad cannot rely upon actually existing competition, when it is such as to affect rates, merely because it may have been conducted by secretly and illegally cutting rates. A railroad, like an individual, has the right to defend itself against an antagonist, however illegal may be the conduct of such antagonist in making the assault.

But it is useless to now discuss such abstract proposition; because the defendants do not rely upon the competition which

existed prior to March 24–25, 1902. They place their defense upon the competition which existed between March 24–25, 1902, when the injunctions were granted, and August 8, 1902, when the Great Western contract was made; and during that period, there is no pretense that the competition was in any respect illegal.

XXVII.

The Contention that the Chicago Great Western Company Should Not Be Allowed to Take Advantage of Its Own Wrong.

Appellant's counsel contended in oral argument in the Circuit Court that as the Chicago Great Western Company inaugurated a reduction of rates on livestock products by the contract which it made on August 8, 1902, it would be inequitable to allow that company to rely upon the effect of said reduction; because, to do so would be to permit said company to take advantage of its own wrong.

The contention assumes that the reduction of rates made by the Great Western Company on August 8, 1902, was *wrong;* whereas I have shown in Sections XXIV and XXV of this argument that in making said reduction said company committed no wrong. Even if it be assumed, for the purposes of this section of my argument, that the Great Western Company, by reducing the rates on August 8, 1902, did thereby inaugurate a competition, what provision of the Act to Regulate Commerce makes it unlawful or *wrong* for a railroad company to inaugurate competition? While it is true that the Act to Regulate Commerce does not require railroad companies to compete, it does, by its pooling section, prohibit the suppression of competition; and the manifest purview of the entire act is to encourage competition.

XXVIII.

The Commission Erred in Holding that the Chicago Great Western Company Unduly Discriminated Against the Livestock Traffic.

The Commission in its Report and Opinion said:

"It is undoubtedly true that the Chicago Great Western Company had a right to change its rate on packing-house products for the purpose of increasing its business, but that right is qualified by the prohibition that that company shall not *unduly discriminate* against another kind of traffic; and when that company established and put in force from Kansas City and St. Joseph to Chicago rates on the products of livestock that were lower than rates it was then exacting between the same points on livestock, it *unduly discriminated* against the latter traffic."

Rep. & O., Trans., pp. 45, 46.

The word "discriminate" (so far as it relates to differences between persons, localities, or traffics) is to be found only in the second section of the act; and I have hereinbefore shown, in Section XX of this argument, that the second section has no application to this case.

I assume that what the Commission intended to say, in the extract above quoted from the Report and Opinion, was that the right of the Chicago Great Western Company to change its rates on packing-house products is qualified by the prohibition that said company shall not unduly "prejudice" another kind of traffic; and when that company established and put in force rates on the products of livestock that were lower than rates it was then exacting on livestock, it unduly "prejudiced" the

latter traffic. In other words, I assume that the Commission intended to find a violation of the third section, which prohibits "undue prejudice," instead of a violation of the second section which prohibits "unjust discrimination."

I concede that the right of the Chicago Great Western Company to change its rates on packing-house products is qualified by the prohibition that said company shall not unduly prejudice the livestock traffic; but I deny that the acceptance by that company of lower rates on livestock products than it charges on livestock creates an "*undue prejudice*" against the livestock traffic.

No prejudice is "*undue*" unless it arises from *the* "*voluntary*" and "*wrongful*" act of a carrier; and no reduction of rates by a carrier is either "voluntary" or "wrongful," if it be forced upon the carrier by actual competition affecting rates.

181 U. S., p. 18, E. T. V. & G. Ry. Co. v. I. C. C.

I have hereinbefore shown in Sections X, XI and XII that the Great Western Company was forced by the competition existing when the contract of August 8, 1902, was made to reduce its rates on the livestock product, or abandon a portion of its share of that traffic to its competitors.

XXIX.

The Commission Erred in Holding that the Prejudice Against Chicago is Undue.

The Commission in its Report and Opinion said:

"The discrimination against the transportation of live stock to Chicago from the shipping points in question, brought about by defendants' action in establishing and putting in force upon the products of live stock, rates of transportation lower than those contemporaneously exacted by defendants for the transportation of live stock, between the same points, injured the live stock market of Chicago, and those interested therein; is not justified by difference to defendants in the cost of transportation, and is not otherwise justified; and therefore subjects the traffic in live stock, and the Chicago live stock market, and those interested therein, including complainant, to undue and unreasonable prejudice and disadvantage, and gives to the traffic in the products of live stock and shippers and localities interested in such traffic undue and unreasonable preference and advantage."

Rep. & O., Trans., p. 41.

I have hereinbefore shown, in Sections XXIV to XXVIII inclusive, that the action of the Great Western Company in reducing its rates on livestock products, by making the contract of August 8, 1902, did not create undue or unreasonable prejudice either against the traffic in livestock, or the livestock market of Chicago, or those interested therein; and if I be right in my contention as to that company, the other defendant companies who were forced to meet the rates put in by the Great Western Company cannot be guilty of *undue* or *unreasonable* prejudice either to the traffic in livestock, or to the livestock market of Chicago, or to those interested therein.

XXX.

The Fact that Appellees Could, If They Chose to Do So, Make the Competition on Livestock as Severe as the Competition on the Product is Not Material.

Appellant's counsel contended in oral argument in the Circuit Court that as the appellees have seen proper to reduce the rates on livestock products, and as they could, if they chose to do so, make corresponding reductions in the rates on livestock, they should be compelled to make such reductions in the latter rates.

In other words, appellees should be compelled to compete as severely in the livestock traffic as they have seen proper to compete in the livestock product traffic. This is exactly analogous to the contention of the same counsel in the LaGrange case, and it was with reference to said contention that this Court said it "would destroy the whole effect of the act, and cause every case where competition was involved to depend not upon the fact of its existence as affecting rates, but upon the possibility of its arising."

190 U. S., p. 283, I. C. C. v. L. & N. R. R.

XXXI.

Appellees Do Not Contend That a Railroad May Use Its Franchise to Build Up Some Markets and Destroy Others.

The Commission in its Report and Opinion said:

"As it appears to us, a contrary holding would be equivalent to saying that a quasi-public servant may use its franchise for the purpose of building up some markets and destroying others, if in its judgment its stockholders will be benefited by such action."

Rep. & O., Trans., p. 46.

I concede that no railroad company has the right to use its franchise "for the purpose of building up some markets and destroying others," even though in its judgment its stockholders will be greatly benefited by such action; but I deny that either of the defendants in reducing the rates upon livestock products did so for any such "purpose."

I have hereinbefore shown in Sections XXIV to XXVIII inclusive that the Great Western Company in reducing its rates on livestock products by making the contract of August 8, 1902, did so, not for the "purpose" of building up one market or destroying another; but for the purpose of securing its share of the livestock product traffic; and that said reduction was not voluntary, but forced upon it by competitive conditions which it could not ignore without abandoning to its rivals a portion of its share of said traffic. And in Section XXIX, I have shown that the other defendant companies were forced to meet the rates put in by the Great Western Company or abandon all of the livestock product traffic to that company.

The prohibition of the third section, when that section is considered in its proper relation, is directed against "undue preference arising from the *voluntary* and *wrongful* act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carrier."

181 U. S., pp. 18, 19, E. T. V. & G. Ry. Co. v. I. C. C.

It is true that the appellees by accepting lower rates on livestock products than they charge on livestock, may have aided somewhat in building up the Missouri River markets, and may have somewhat injured Chicago as a livestock market, and persons interested in the livestock traffic. But those results were merely incidental, and entirely foreign to the *purpose* of the de-

fendants. Said results have followed inexorably from the competition which the Act to Regulate Commerce is supposed to encourage, and the suppression of which is, by that act, in effect, made illegal. It follows that such loss as may have inured to one market, or to one traffic, as compared with another market or another traffic, in consequence of said competition, is, in contemplation of the Act to Regulate Commerce, *damnum absque injuria*.

To paraphrase the language of this Court in the Chattanooga case: "If the preference occasioned in favor of a particular traffic (e. g. the livestock product traffic) by competition gives rise to the right to charge the lesser rate on that traffic, it cannot be that the availing of this right is the cause of the preference." . . . . "The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this Court; that is, that competition which is real and substantial and exercises a potential influence on rates on a particular traffic, brings into play the dissimilarity of circumstances and conditions provided for by the statute, and justifies the lesser charge on the more competitive traffic than on the less competitive traffic, and that this right is not destroyed by the mere fact *that incidentally* the lesser charge on the more competitive traffic may seemingly give preference to that traffic, and the greater rate on the less competitive traffic may apparently engender a discrimination against it. We say seemingly on the one hand, and apparently on the other, because in the supposed cases the preference is not 'undue' nor the discrimination 'unjust.' This is clearly so when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge."

181 U. S., 18. 19, E. T. V. & G. Ry. Co. v. I. C. C.

XXXII.

A Carrier May Promote Its Own Interest Provided it Does Not Create an Undue Preference.

In his printed argument in the Circuit Court, Mr. Shaver of counsel for appellant, said:

"It is, of course, conceded that a carrier may so adjust its rates as to promote its legitimate interest, but in so doing, it cannot adopt rates or a rate adjustment which will bring about an *undue* preference or an *undue* prejudice or any violation of the law."

I fully agree with Mr. Shaver's statement of the law as set forth in the extract just quoted; but, as held by this Court in the case of T. & P. Ry. v. I. C. C., 162 U. S., p. 238, the question whether discrimination is due or undue is a question of fact, and I deny that the reduction in rates on livestock products, made by the Chicago Great Western contract on August 8, 1902, constitutes an *undue* preference, or an *undue* prejudice, or any other violation of the law.

I have hereinbefore shown in Section XXII that a preference or prejudice is not *undue* unless it arises from the *voluntary* and *wrongful* act of a carrier; that as a carrier has a right to compete, its doing so is not "*wrongful;*" that where the act done by the carrier is forced upon it by competition, such act is not "*voluntary;*" and that the mere fact that *incidentally* the lesser charge on the more competitive traffic may seemingly give preference to that traffic, and the greater rate on the less competitive traffic may apparently engender a prejudice against it, such apparent preference and prejudice are not undue.

181 U. S., pp. 18, 19, E. T. V. & G. Ry. Co. v. I. C. C.

In his printed argument below, Mr. Shaver also cited the case of Harris v. Cockermouth & Workington Ry. Co., 3 C. B. (N. S.) 693, as sustaining the proposition that "preferences given to prevent diversion of traffic from the carrier or to induce transfer of traffic to one carrier which would otherwise go to another, are unlawful and cannot be justified on the ground of profit to the carrier giving them."

In the Harris case there was no actual competition; but certain advantageous terms were given to Lord Lonsdale's tenants because it was said that if those terms were not given, Lord Lonsdale *might make a railway which would compete with the railway of the defendant.* It will be found in the judgment of Mr. Justice Wills that his opinion was based exclusively upon the fact *that there was no existing competition*, but merely a fear that competition might arise in the future.

8 Ry. & Can. Traf. Cas. (Brown & Macnamara), p. 105., Pickering, Phipps et al. v. L. & N. W. R. Co.

In other words, the Harris case is in strict accord with the LaGrange case cited in Section XXX, and in which this Court held that the mere possibility of competition arising in the future is not sufficient. The Harris case is no authority that a carrier is not justified in reducing its rates to secure its proper share of a certain traffic, when the reduction is forced upon it by competition actually existing, such as that in the case at bar.

The Harris case was referred to by this Court in the "Import Case" as follows:

"But Chief Justice Cockburn said: 'I quite agree that this Court has intimated, if not absolutely decided, that a company is entitled to take into consideration any circumstances, either of a general or of a local character, in considering the rate of charge which they will impose upon any particular traffic. . .

. . As, for instance, in respect of terminal traffic, there might be competition with another railway; and in respect to terminal traffic as distinguished from intermediate traffic, it might well be that they could afford to carry goods over the whole line cheaper, or proportionately so, than they could over an intermediate part of the line.'"

162 U. S., pp. 223, 224, T. & P. Ry. v. I. C. C.

It will be noticed that this Court interprets the Harris case as conceding in effect that actual competition, as contradistinguished from mere possible competition, may be taken into consideration by a carrier in fixing its rates; and, under that interpretation also, the Harris case is a decision in our favor.

Mr. Shaver, in his printed argument below, also cited the case of Evershed v. London & Northwestern Ry. Co., 2 Q. B. Div. 254, as sustaining the proposition "that preferences given to prevent diversion of traffic from the carrier or to induce transfer of traffic to one carrier which would otherwise go to another, are unlawful and cannot be justified on the ground of profit to the carrier giving them."

Section 90 of the English Railway Clauses Act, 1845, contains what is known as the English "Equality Clause," which provides "that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, *passing only over the same portion of the line of railway under the same circumstances.*"

2 Ann. Rep., I. C. C. (1888), p. 89.

The English "undue preference clause" is quoted above in Section XXI.

In the case of Pickering, Phipps and others v. London & Northwestern Ry. Co. and others, Lord Herschell, in commenting upon the Eversheld case, said:

"In Eversheld's case no doubt, in the argument in the Court of Appeal, both the equality section and the undue preference section were alluded to as they were in a judgment to which I will call attention in a moment; but the equality section clearly applied in that case, because all the goods were carried only over the same piece of line, and, therefore, on that ground the House of Lords affirmed the judgment in Eversheld's case; but in the view of the House of Lords, in the subsequent case of the Denaby Main Colliery Company, it was only on that ground that they affirmed it, and not with any reference to Section II. of the Act of 1854 (which is the English 'undue preference clause'), inasmuch, as in the subsequent case, the House of Lords held that no such action, as was brought in Eversheld's case, would have lain in respect of any charge of undue preference under the Act of 1854. *Therefore Eversheld's case as an authority upon this point is gone.*"

8 Ry. & Can. Traf. Cas., p. 108, Pickering, Phipps and others v. London & Northwestern Ry. Co.

The English "equality clause" required an absolute rigid equality of charge in the limited cases to which it applied; but it only applied in those cases where passengers, or where goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, *passed only over the same portion of the line of railway* under the same circumstances. The expression "passing only over the same portion of the line," was construed by the English courts to mean "passing between the same points of departure and arrival and passing over no other part of the same line."

4 Ry. & Can. Traf. Cas., p. 452, M. S. & L. Ry. Co. v. The Denaby Colliery Co.

4 Ry. & Can. Traf. Cas., p. 460, Murray v. G. & S. W. Ry. Co.

6 Ry. & Can. Traf. Cas., p. 141, The Denaby Main Colliery Co. v. The M. S. & L. Ry. Co.

Law Rep., 21, Q. B. (1888), pp. 217, 218, L. & Y. Ry. Co. v. Greenwood.

The English equality clause has never been reenacted in this country; the nearest approach to it is the second section of the Act to Regulate Commerce, but that section does not contain the words "passing only over the same portion of the line of railway under the same circumstances."

24 U. S. Stat. at Large, pp. 379, 380.

It will be noticed that Lord Herschell held that the Evershed case is not now an authority in England except upon the English "equality clause," which is not in force in this country; and that as to the English "undue preference clause" (Section 2 of the English Act of 1854), upon which the undue preference clause in the third section of the Act to Regulate Commerce is modeled, *the Evershed case, as an authority, "is gone."*

8 Ry. & Can. Traf. Cas., p. 108, Pickering, Phipps and others v. London & Northwestern Ry. Co., and others.

The Ever-hed case was relied upon by the Interstate Commerce Commission in the "Import case;" and, in reference to it, this Court said:

"In the case of Budd v. London & Northwestern Ry. Co., 4 Eng. Ry. and Canal Traffic Cases, 393, and in London & Northwestern Railway v. Evershed, 3 App. Cas., 1029, it was held that it was not competent for the railway company to make discriminations between persons shipping from the same point of departure to the same point of arrival, but even, in those cases, it

was conceded that there might be circumstances of competition which might be considered. At any rate, those cases have been much modified, if not fully overruled by the later cases—particularly in Denaby Main Colliery Company v. Manchester, Sheffield & Lincolnshire Railway Co., 11 App. Cas., 97, and in Phipps v. London & Northwestern Railway, 2 Q. B. D. (1892), 229, 236."

162 U. S., p. 224, T. & P. Ry. Co. v. I. C. C.

It will, therefore, be seen that neither the Harris case nor the Evershed case is now authority for the proposition to support which they were cited by Mr. Shaver.

XXXIII.

The Object of the Chicago Great Western Company in Reducing the Rate on Livestock Products was Not to Build Up the Missouri River Markets.

Mr. Shaver, of counsel for appellant, in his printed argument in the Circuit Court said: "The object of the reduction in the rate on the products by the Chicago Great Western Company, making that rate lower than the rate on the livestock, and the necessary effect of that rate adjustment, was to divert to the Missouri River markets shipments of livestock which would otherwise go to Chicago, and thus build up the river markets at the expense of Chicago. This is a conceded fact, or if not conceded it is abundantly proven."

The fact is neither conceded nor proven; on the contrary, it is denied and disproven.

The Commission finds and so reports that "the President of the Chicago Great Western Company stated that his company

entered into the aforesaid contract *for the purpose* of securing a greater proportion of the traffic in the products of livestock than it had previously been able to obtain."

Rep. & O. Trans., p. 40.

Again the Commission says: "The President of the Chicago Great Western stated that his company entered into the contract *for the purpose* of securing more of the traffic in the livestock products than it had previously been able to obtain."

Rep & O. Trans., p 45.

Again the Commission says: "It is undoubtedly true that the Chicago Great Western Company had a right to change its rate on packing-house products *for the purpose* of increasing its business, but that right is qualified by the prohibition that that company shall not unduly discriminate against another kind of traffic."

Rep. & O. Trans., pp. 45, 46.

It will be seen from the above extracts from the Report and Opinion of the Commission that the object or purpose of the Great Western Company in making the contract of August 8, 1902, was not to build up the Missouri River markets at the expense of Chicago, but it was to secure to that company what its President considered to be its due share of the product traffic.

I also deny that the "necessary effect" of the reduction in the rate on the product was to divert to the Missouri River markets shipments of livestock which ought otherwise go to Chicago. I deny that the effect of said reduction has in fact been to divert to the Missouri River markets shipments of livestock which ought otherwise go to Chicago. I insist that the great weight of the testimony shows that even under the present rate adjust-

ment, Chicago has a decided advantage over the Missouri River points and over the intermediate points.

See diagram No. 8.

From stations on the C. M. & St. P. Ry. west of St. Paul, ranging from 75 to 395 miles, the combination of the livestock rates from said stations to St. Paul, plus the packing-house product rate from St. Paul to Chicago, is in all instances greater than the straight rates on livestock from the same stations to Chicago.

Calkins Ex. A, Trans. p. 539.

The same is true from stations on said railway south of St. Paul, ranging from 75 to 200 miles.

Calkins Ex. B, Trans., p. 540.

The same is true from stations on said railway west of Cedar Rapids, ranging from 14 to 200 miles.

Calkins Ex. E, Trans., p. 543.

The same is true from stations on said railway west and north of Des Moines, ranging from 25 to 200 miles.

Calkins Ex. D, Trans., p. 542.

The same is true from stations on said railway north and west of Sioux City, ranging from 25 to 330 miles.

Calkins Ex. D, Trans., p. 542.

The same is true from stations on said railway west and southwest of Ottumwa, ranging from 25 to 200 miles.

Calkins Ex. C, Trans., p. 541.

The same is true from stations on the C. R. & I. P. Ry. east

CHARTS

TOO

LARGE

FOR

FILMING

and west of Kansas City, St. Joseph, Des Moines and Cedar Rapids.

Gower Test., Trans., pp. 752, 753, 754 and 752.

The same is true from stations on the C. & N. W. Ry. 70 miles south of Sioux City and 75 miles east of Sioux City.

McCullough Ex. A, Trans., p. 941.

The same is true from stations on said railway northwest of Sioux City, ranging from 44 to 338 miles.

McCullough Ex. B, Trans., p. 942.

The same is true from stations on said railway west of South Omaha, ranging from 25 to 250 miles.

McCullough Ex. D, Trans., p. 943.

The same is true from stations on said railway east of South Omaha, ranging from 27 to 160 miles.

McCullough Ex C, Trans., p. 943.

The average rate into Cedar Rapids, Iowa, on cattle and hogs, plus the product rate to Chicago, is 24½ cents; while the average rate upon the animal from points in Iowa to Chicago is 21 cents, giving an advantage to the Chicago packer of 3½ cents.

Koch Test., Trans., p. 604.

From the foregoing references to the testimony it will be seen that the rate adjustment is quite as favorable to Chicago as it should be.

If Chicago has the advantage in the rate adjustment over St. Paul, at a station on the C. M. & St. P. Ry., 395 miles west of St. Paul; and if Chicago has the advantage in the rate adjustment over Sioux City at a station on the C. & N. W. Ry., 338 miles northwest of Sioux City; and if Chicago has the advantage in

the rate adjustment over South Omaha at a station 250 miles west of South Omaha, I am at a loss to understand how that adjustment can be unfair to Chicago.

The actual movement of cattle and hogs under the present rate adjustment also proves that the effect of said adjustment has not been to divert to the Missouri River markets shipments of livestock which should otherwise go to Chicago.

From stations on the C. & N. W. Ry., even in the so-called 23½ cent zone, the shipments of cattle and hogs during the fiscal year ending June 30, 1905, to Chicago were 10,286 cars; to South Omaha only 1,893 cars; and to Sioux City only 1,710 cars.

McCullough, Trans., p. 983.

Seventy per cent of the livestock moving over the Chicago & Northwestern Railway moves to Chicago, while the remaining 30 per cent is divided between St. Paul, Sioux City, South Omaha, Marshalltown, Des Moines and Cedar Rapids.

McCullough, Trans., p. 956.

From stations on the C. G. W. Ry., located more than 300 miles from Chicago and within 150 miles of St. Paul 1,425 cars of livestock moved to Chicago as against 1,023 cars to St. Paul during the fiscal year ending June, 1905.

Stickney, Trans., p. 634.

From stations on the C. G. W. Ry. located within 150 miles of Kansas City and more than 440 miles from Chicago, 164 cars of livestock moved to Chicago as against 105 cars of livestock to Kansas City during the same year.

Stickney, Trans., p. 634.

During the same year, out of a grand total of 15,134 cars of livestock, handled by the C. G. W. Ry., 65.1 per cent went to

Chicago; the remaining 35 per cent moved as follows: 6.9 per cent to St Paul; 6.9 per cent to Omaha; 19 per cent to St. Joseph and 2.1 per cent to Kansas City.

Stickney, Trans., p. 634.

During the same year the mileage of loaded livestock cars on the C. G. W. Ry. were as follows: To Chicago, 2,597,216; to St. Paul, 68,163; to Omaha, 43,400; to St. Joseph, 178,464; to Kansas City, 80,953.

Stickney, Trans., p. 635.

It will be seen that the mileage of loaded livestock cars on the C. G. W. Ry. to Chicago was more than seven times as much as the combined mileage to all of said Missouri River markets.

During the same year the average distance that livestock was hauled on the C. G. W. Ry. was—to Chicago 263 miles; to Kansas City, 250 miles; to St. Paul, 66 miles; to St. Joseph, 62 miles, and to Omaha, 43 miles.

Stickney, Trans., p. 635.

It will be seen, therefore, that though the average distance to Chicago was greater than to any of said Missouri River markets, Chicago obtained 65.1 per cent of the grand total of 15,134 cars of livestock handled by the C. G. W. Ry. during that year.

But, if the fact were that the *incidental* effect of the reduction in the rate on the products by the Chicago Great Western Company had been to divert to the Missouri River markets certain shipments of livestock which might otherwise have gone to Chicago, it would by no means prove that the action of the Chicago Great Western Company was unlawful. If the action of the Chicago Great Western Company, in making said reduction in the product rates, was forced upon it, and was necessary to enable it to obtain what it considered to be its due share of the

product traffic, the fact that the *incidental* effect of such reduction may have been to have diverted a portion of the product traffic to the Missouri River markets is, so far as Chicago is concerned, *damnum absque injuria*. Competition which is real, and substantial, and exercises a potential influence on rates on a particular traffic, brings into play the dissimilarity of circumstances and conditions provided for by the statute, and justifies the lesser charge on the more competitive traffic than on the less competitive traffic; and this right is not destroyed by the mere fact *that incidentally* the lesser charge on the more competitive traffic may *seemingly* give a preference to that traffic, and the greater rate on the less competitive traffic may *apparently* engender a discrimination against it.

See 181 U. S., pp. 18, 19, E. T. V. & G. Ry. Co. v. I. C. C.

XXXIV.

THE QUESTION AS TO WHO ORIGINATES A REDUCTION OF RATES IS NOT MATERIAL.

In his printed argument in the Circuit Court, Mr. Shaver of counsel for appellant, said:

"It cannot be questioned that the Chicago Great Western *originated* the so-called competition. The *originator* of *competition* cannot be heard to set up that competition in justification of a preference in rates. *If so, whenever a carrier desires to give a preference, he will only have to reduce his rate and thus inaugurate competition between his own and rival lines.*"

And further:

"The competition in rates between the Missouri River and Chicago, if any exists, is *between the defendants themselves.* They

should not be allowed to set up their own action in justification of a wrong."

With respect to the position of appellant, the Circuit Court in the course of its opinion said:

"Their position is that competition cannot apply to this case because one of the defendants (the Chicago Great Western Railway Company) originated the competition in rates. They argue that in all of the other cases decided by the Supreme Court the competition resulting in the cutting of rates was begun by some transportation company not a defendant in the hearing before the Commission and the Court, *and that the identical question involved in this case has not been passed upon by the Supreme Court.*"

Trans., p. 177.

It is submitted, however, with all deference to the views of counsel for appellant, that the identical question suggested by him in this case was necessarily involved in every case decided by this Court on the third and fourth sections of the act; which cases have been hereinbefore commented upon in Section XXII of this brief.

In all of these cases it was held that the existence of competition, which affects rates, differentiates the circumstances and conditions; and in none of them was the question as to who originated the competition deemed of sufficient importance to merit either suggestion from the counsel, or comment from the Court.

There is not in the opinions of the Circuit Courts, the Circuit Courts of Appeal, or this Court, in any of the cases referred to in Section XXII of this brief, the slightest suggestion, or intimation, that the carrier, who, under stress of the competition which prevailed, first inaugurated the reduction in rates to

the competitive points should be identified, and required to reduce all of its intermediate rates in conformity with the fourth section; or to remove all prejudices or disadvantages to which other points on its line may have been incidentally subjected by reason of the reduction of rates to the competitive points.

Nor is there the slightest suggestion or intimation that other carriers serving the competitive points, who met the reduction in rates so inaugurated by a competitor, are, because they did so, under legal obligation to reduce all their intermediate rates in conformity with the fourth section; or to remove all prejudices or disadvantages to which other points on their lines may have been incidentally subjected by reason of their meeting the rates to the competitive points.

As forcefully said by his Honor, Judge Bethea, in this case at Circuit, with respect to the inauguration of *competition in rates:*

"Why a defendant cannot begin the competition is not apparent. Some one must begin. *Why not a defendant if he is losing the business?*"

Trans., p. 177.

XXXV.

The Practice of Making Rates on Livestock the Same as, or Lower Than, the Rates on the Products of Livestock, Is by No Means Universal.

The Commission, in its Report and Opinion, said:

"Aside from the rates in question, carriers generally make rates on livestock somewhat, and in many cases considerably, lower than on the product. This was formerly true concerning rates made by carriers operating between the Missouri River and

Chicago; but soon after the large packers erected packing-houses at different points on the Missouri River changes began to take place."

Rep. & O., Trans., p. 32.

This finding of the Commission is disproven, even as to the territory in controversy, by Appendix "G" to the Sixteenth Annual Report of said Commission, entitled "A Forty-year Review of Changes in Freight Tariffs," prepared by the Auditor of the Commission, and put in evidence by defendants.

Trans., pp. 987, 989, 990, 991, 993, 1188, 1189.

Said appendix shows that for sixteen years and seven months, out of a total period of twenty-three years, extending from 1879 to 1902, the rates on live cattle from Kansas City to Chicago were higher than the rates upon the products of cattle, by from 5 to 7½ cents; and that during about one and one-half months of that period the rates on live cattle were from 17 to 20 cents higher than the rates upon the product.

Trans., pp. 987, 989, 990, 991, 993, 1188, 1189.

Said appendix further shows that for fifteen years and six months of the same period the rates on live hogs from Kansas City to Chicago were higher than the rates on their product by from 5 to 11.6 cents per 100 pounds.

Trans., pp. 987, 989, 990, 991, 993, 1188, 1189.

Said appendix further shows that for sixteen years and ten months of the same period the rates on live cattle from Kansas City to St. Louis were higher than the rates on their products by from 5 to 15½ cents.

Trans., pp. 987, 989, 990, 991, 993, 1188, 1189.

Mr. Keepers testified that the present rates on livestock from Omaha and Sioux City, to New Orleans and Cairo, are much higher than the rates on packing-house products.

Trans., p. 419.

XXXVI.

The Practice of Making Rates on Raw Material the Same as, or Lower than, the Rates on Manufactured Products, is by No Means Universal.

The Commission in its Report and Opinion said:

"Carriers usually make lower rates on raw material than on its manufactured products."

Rep. & O., Trans., p. 32.

All of the raw cotton of the South that is moved to the North pays to the Southern railroads higher rates per 100 pounds than manufactured cotton products.

Trans., p. 1372.

Raw cotton is produced in the South, but not in the North; and the Southern railroads in carrying raw cotton to the North meet no competition in that traffic from the Northern lines; but cotton products are manufactured in the North as well as in the South, and the Southern railroads in moving such products to the North meet with very strong competition from the Northern lines in the transportation of that traffic. The result is that the Southern railroads can successfully maintain higher rates per 100 pounds for the transportation of raw cotton than they can secure for the transportation of manufactured cotton products.

The Commission itself authorized a rate of as much as $2.15 a bale on uncompressed cotton from Meridian and Jackson to New Orleans; and at the same time it authorized a rate of as much as $1.65 per bale on compressed cotton between the same points.

2 I. C. Rep., p. 791, N. O. Cotton Ex. v. I. C. R. R. Co.

The uncompressed bale represents the raw material from which the compressed bale is manufactured by putting it into a powerful steam compress, and increasing its density to about 22½ pounds to the cubic foot.

From 40 to 45 bales of compressed cotton can be carried in a box car; while only from 20 to 25 bales of uncompressed cotton can be carried in the same car.

2 I. C. Rep., p. 781, N. O. Cotton Ex. v. I. C. R. R. Co.

That fact doubtless influenced the carriers as well as the Commission in recognizing the propriety of charging more per 100 pounds upon what may be regarded as the raw material than was accepted upon what may be regarded as the manufactured product.

In the case of I. C. C. v. L. S. & M. S. Ry. Co., 134 Fed. Rep., pp. 947, 948, a higher rate per 100 pounds was authorized for the carriage of straw than was charged for the carriage of wheat.

Straw may be regarded as the raw material, and wheat as the manufactured product;—the process of manufacture consisting of threshing the wheat from the straw.

The fact that wheat occupies, per 100 pounds, much less cubic space in a car than straw occupies, doubtless influenced the carriers as well as the Court in recognizing the propriety of charging more per 100 pounds upon what may be regarded as the raw material than was accepted upon what may be regarded as the manufactured product.

The same consideration applies to the case at bar; as it re-

quires about two cars of cattle or hogs to make one car of live stock products.

Rep. & O., Trans., p. 39.

In this connection, it must be remembered that livestock is itself a manufactured product, in the most practical sense of the term.

It requires about four cars of corn to manufacture one car of cattle.

Trans., p. 571.

From Spencer, Ia., to Chicago, a distance of 454 miles, a carload of corn pays the carrier $112.20, and four carloads of corn, of course, pay $448.80; while a carload of cattle, between the same points, pays only $48.18.

Trans., pp. 576, 577.

It will be seen that the revenue realized per carload on the raw material (corn) is more than nine times as much as the revenue realized per carload on the manufactured product (live stock).

In the case at bar, the Commission has, in effect, ordered us to reduce the livestock rates in order to equalize them with the livestock product rates. Will the Commission in some subsequent case, on complaint of shippers of corn, order us to reduce our rates upon corn in order to equalize them with our livestock rates?—and if so, what is to be the ultimate result of the endless chain of rate reductions that may be ordered by the Commission?

XXXVII.

The Principle that Rates on Raw Material Should Not Exceed Those on Manufactured Products Cannot Be Enforced Except Where There is No Competition.

Suppose that a railroad, shown on the following diagram, No. 9, runs from "A" to "B," and has no competition:

A B

Diagram No. 9.

Such a railroad, in the total absence of competition, would naturally charge the higher rate upon livestock, or upon livestock product, according to whether the one or the other costs the railroad the most to carry it.

While I am firmly convinced from the testimony in the case at bar that it costs more to carry livestock than it costs to carry the products of livestock, I will assume, for the purposes of this section of my argument, that it costs more to carry the product; and under that assumption, the supposed railroad would, in the absence of competition, charge a higher rate upon the product than it charged upon the livestock.

But now let us suppose that there is also a navigable river, which runs from "A" to "B," as shown in the following diagram No. 10.

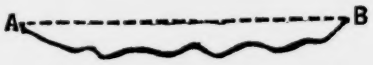


Diagram No. 10.

It is well known that while steamboats are well adapted to the carriage of boxed meats, they are not well adapted, if at all, to the carriage of live animals.

Suppose that steamboats plying on the river from "A" to "B" cut the rail rates on boxed meats to a point below the rail rates on livestock. What shall the railroad do?

If the railroad refuses to meet the boats' rates on boxed meats, all of the boxed meat traffic will go by the boats; and at a rate less than the rail rate on livestock.

The relation between the rates on livestock and the rates on boxed meats as established by the railroad will be destroyed by the boats' competition as effectively as if the railroad had met the boats' rates on the boxed meats.

The public will be deprived of the railroad's service as a carrier of boxed meats; the railroad will lose the revenue which it could have earned from carrying boxed meats, at the boats' rates; and no one will be benefited except the boats.

If, on the other hand, the railroad meets the boats' rates on boxed meats, *its* action will not *create* the preference in favor of boxed meats. The preference was created *by the boats.* The railroad did not *voluntarily* meet the boats' rates on boxed meats, but it was forced to do so, or abandon the boxed meat traffic.

181 U. S., p. 18, E. T. V. & G. Ry. Co. v. I. C. C.

The question as to whether the rates on raw material shall, or shall not, exceed those on manufactured products, cannot, in

the face of competition, be determined by reference to any theoretical relation which may be supposed to exist between them.

The question must necessarily be determined by the varying circumstances and conditions which affect the two kinds of traffic, and competition will be found to be the most potent of any of those circumstances and conditions.

On the cross-examination of President Ripley, one of complainant's expert railroad witnesses, I submitted to him the following diagram No. 11:

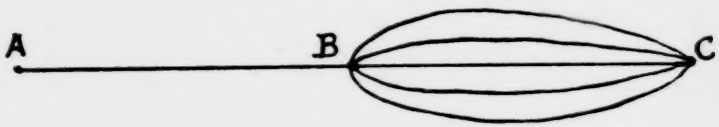


Diagram No. 11.

I asked him to first suppose that he is the president of a railroad running from "A" to "B;" that "A" is a point 450 miles west of the Missouri River, and that "B" is a point on said river; that the road runs through a country where livestock is raised, but where there are no packing-houses for the slaughter of cattle. I asked him whether, in fixing his rates for the carriage of livestock from "A" to "B," he would take into consideration the rates charged on packing-house products by the various competing lines operating between the Missouri River and Chicago, which is represented on said diagram by the letter "C." His answer was: "Certainly not. The two territories are entirely distinct and separate. Whatever the rate was from 'B' to 'C' would not have any effect on what we should consider a proper rate from 'A' to 'B.' Conditions might be entirely different. Probably would be."

I then asked him if, in the event he should build an extension of his road from "B" to "C," he would fix his rates on packing-house products moving between "B" and "C" in relation to his rates on livestock, and whether he would reduce his rates on livestock because he was forced to accept lower rates on packing-house products between "B" and "C." His answer was: "Certainly not."

Trans., pp. 1118, 1119.

The same diagram was submitted by me to Mr. Peabody, another railroad expert introduced by complainant, and he answered the questions put to Mr. Ripley in the same way as Mr. Ripley had answered them.

Trans., pp. 1372, 1373.

XXXVIII.

The Cost of Transportation Cannot Be Used as a Factor in Making Rates.

The Commission, in its Report and Opinion, said: "Although we think cost of transportation is a very important element, we do not consider it a controlling element in this case."

Rep. & O., Trans., p. 44.

The Commission might have said, with equal accuracy, that the cost of transportation cannot be a *controlling* element in any case.

In the first place, it is impossible to ascertain the cost of carrying any one article, or any one description of traffic, between any two points on a railroad; and in fixing a rate upon

such article or traffic, it would be manifestly absurd to attempt to use as a factor something which we know cannot be ascertained.

The reason why it is impossible to apportion with accuracy the cost of service among the items of traffic is thus stated by the Commission In Re Southern Ry. & S. S. Association, sometimes cited as In Re L. & N. R. R.:

"First of all, when it is undertaken, there must be an apportionment between the passenger traffic and the freight traffic; and if we suppose this to be made with reasonable accuracy, there must then be a like apportionment between the different kinds and classes of freight. Freight comes to a road in infinite variety; some heavy, some light, some in large packages, some in small, some perishable or of a special value and requiring

peculiar accommodations and care; it is picked up in varying quantities at numerous stations, to be carried differing distances, sometimes on fast trains and sometimes on slow; the service is performed by men whose compensation differs, but the most of whom have something to do with all branches of the traffic, so that all assist in carrying it on over a road and by means of buildings, appliances, and equipment which have been provided for the whole. Any attempt to apportion the cost, therefore, would, at the best and under the most favorable circumstances, only reach an approximation. *This is so well understood, the world over, that the propositions which from time to time have been made in other countries to measure the charges of the carrier by the cost of carriage solely have always been abandoned after investigation.*"

1 Interstate Commerce Rep., p. 282, right col.

For several years, after the Commission was first organized, it required railroad companies, in their annual reports, to attempt to apportion the expense between the freight and passenger service; but the Commission soon became convinced of the futility, not to say absurdity, of the requirement, and since 1893 the Commission has not required the railroads to even attempt to make such an apportionment.

Statistics of Railways, 1893, p. 81.

But, if the cost of carrying any one article, or any one description of traffic, between any two points on a railroad, could be ascertained with substantial accuracy, it could not be used as a rate-making factor. Upon this subject the Commission said:

"On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded, because the charge for carriage would be greater than it could bear."

1 Ann. Rep., I. C. C. (1887), p. 30.

It is true that some railroad companies, even now, attempt to make an apportionment of their expenses between the passenger traffic and the freight traffic; but it is done upon an arbitrary basis, and without any attempt to arrive at absolute accuracy, even as between those two grand divisions of traffic.

Mr. James Peabody, a most eminent railroad statistician, and

who was examined by complainant in the case at bar, has devised a system by which, after making an arbitrary apportionment of some of the expenses between the passenger traffic and the freight traffic, he can ascertain, with approximate accuracy, "the average cost per gross ton mile" of *all* freight carried over any of the divisions of the Atchison, Topeka & Santa Fe Railway. Mr. Peabody's system is a great advance in railroad accounting, and it entitles him to the gratitude of every railroad official and of every court, or commission, entrusted with the duty of examining into the reasonableness of rates.

But even under his system, as he himself states, while it enables him to ascertain with approximate accuracy, the "average cost per gross ton mile" of carrying *all* freight, it does not enable him to ascertain "the average cost per gross ton mile" of *any particular article* or *any particular freight traffic.*

Trans., pp. 1219, 1220.

The "average cost per gross ton mile" of *all* freight, having been arrived at by Mr. Peabody's system of accounting, it is comparatively easy to form a reliable opinion as to whether the cost per gross ton mile of any particular article, or traffic, is greater than "the average cost per gross ton mile" of *all* freight. For instance, while it is impossible, even by Mr. Peabody's system, to ascertain how much the cost "per gross ton mile" of the livestock traffic, exceeds "the average cost per gross ton mile" of *all* freight, any one familiar with the circumstances and conditions under which the livestock traffic and the other freights are moved, is able to form a reliable opinion as to whether the cost of the livestock traffic is greater or less than the average cost of *all* traffic. Mr. Peabody testified that the cost per gross ton mile of the livestock traffic is greater than the "average cost per gross ton mile" of *all* freight; because

the livestock traffic "requires a great deal of special equipment; trains are run faster; they are run lighter; they involve a large amount of damages; they require a great deal of special equipment; and it is altogether more expensive."

Trans., p. 1346.

In this opinion Mr. Peabody was, in effect, corroborated by every witness who testified upon this point. The witnesses differed as to whether the cost of the livestock traffic was greater or less than the cost of the product traffic, but no witnesses disputed the proposition asserted by Mr. Peabody that the cost of the livestock traffic, "per gross ton mile," is greater than "the average cost per gross ton mile" of *all* freight; and therefore, if rates are to be adjusted on the basis of relative cost, livestock rates should be raised, instead of being lowered, as is, in effect, ordered by the Commission in this case.

Another, and by far the most important reason, why the cost of transportation cannot be used as a controlling factor in making freight rates, is that competition will not permit it to be done.

Let us assume, for the sake of argument, that it is possible to ascertain accurately the cost of transporting livestock from the Missouri River to Chicago, and that such cost amounts to 50 cents per 100 pounds; it is manifest that if any one of the eight carriers competing for the traffic in that territory agrees to accept 23½ cents per 100 pounds, the other carriers must accept as low a rate, or abandon the livestock traffic; and the fact that such lower rate is less than the cost of transporting the traffic can cut no figure whatever in the matter.

XXXIX.

The Value of the Service is an Important Factor in Making Rates.

The Commission in its Report and Opinion said:

"The value of the service is, and always has been considered by carriers, one of the most important elements to be considered when fixing the rates to be charged for transportation."

Rep. & O., Trans., p. 44.

In its first annual report the Commission said:

"It was, therefore, seen not to be unjust to apportion the whole cost of service among all the articles transported, upon a basis that should consider the relative value of the service more than the relative cost of carriage. Such method of apportionment would be best for the country, because it would enlarge commerce and extend communication; it would be best for the railroads, because it would build up a large business, and it would not be unjust to property owners, who would thus be made to pay in some proportion to benefit received; such a system of rate making would in principle approximate taxation; the value of the article carried being the most important element in determining what shall be paid upon it."

1 Ann. Rep. I. C. C., p. 31.

The phrase "value of service," as thus used by the Commission, is made to depend upon the value of the article transported; and upon the principle suggested by the Commission the rate upon the high-priced fat cattle shipped from Iowa to Chicago

for slaughter or export should be very much higher than the rate upon the low-priced scrawny cattle shipped to Chicago to be sold as "canners" or "feeders;" but the competition between the carriers in that territory has rendered it impossible to maintain any greater rate on the high-priced than on the low-priced cattle.

The phrase "value of service" is also used in railroad parlance to indicate the difference between the value of an article at the point of shipment, and the value of a similar article at the place of destination.

If a bushel of wheat produced in Kansas, 700 miles distant from Chicago, be worth 50 cents a bushel at the station in Kansas, and the same grade of wheat be worth $1 per bushel at the elevators in Chicago, the "value of the service" to the shipper rendered by the carrier in transporting the wheat from Kansas City to Chicago is 50 cents per bushel; the shipper could afford to pay 50 cents per bushel without sustaining any loss. But if he paid the entire difference, he would make no profit by the shipment; and therefore, to induce him to ship, the carrier is forced to accept a rate materially less than 50 cents; and in the case supposed the rate would not exceed 25 cents. We see that the "value of service" even in the sense in which I am now using it is controlled by competition. It is the competition between product and product. The price of the Kansas wheat at the point of shipment, as compared with the price of wheat at the point of destination, controls the rate which the carrier can obtain for transportation.

The phrase "value of service" is used in still another sense, to indicate the difference between the rate for which one carrier will transport an article, and the rate for which his competitor will transport it. In the case of the Kansas wheat, just referred

to, if there be two competing lines running from a station in Kansas, to Chicago, the "value of the service" to the shipper rendered by either line cannot exceed the "value of the service" rendered by the other line. The lowest rate offered by either of the lines will control the "value of the service;" and in that case the "value of the service," instead of being fixed, as in the last case, by the competition between product and product, will be fixed by the competition between carrier and carrier. Though the "value of the service" to the shipper as fixed by the competition between product and product may amount to 25 cents per bushel, as shown above, the "value of the service" as fixed by the competition between carrier and carrier may be very much less; though it cannot be more than the "value of the service" as fixed by the competition between product and product. In a word, whether we attempt to use the "cost of service" or the "value of service" in rate-making, we find ourselves absolutely controlled by competition either between market and market or between product and product, or between carrier and carrier; and the most powerful of all those kinds of competition is the competition between product and product.

XL.

If the Law Requires that Rates Shall be Based Either on "Cost of Service," or "Value of Service," the Order of the Commission is Illegal.

Mr. James Peabody, one of appellant's expert witnesses, after stating, on pages 1350 and 1351 of the transcript, his opinion as to the difference in the cost of transporting livestock, and the cost of transporting its products, said: "If I was to make the rates as made on a (the) basis of today, allowing cattle

at 23½ cents, I should put the packing-house products at 28½ cents, and the dressed meats at 33½ cents."

Trans., p. 1351.

He afterwards explained that by using the expression, "If I was to make the rates," he meant that if he were to make them himself, instead of the rates being made by his competitors.

Trans., p. 1373.

Mr. Tomlinson, appellant's chief expert witness, after stating that the most important factor is the "value of the service," testified that the rates on livestock being represented by 100 per cent, the rates on beef (dressed) should be 175 per cent thereof. In other words, whether the rates be based upon "cost of service" or upon "value of service," the rates upon the products should, in the opinion of both of said witnesses, be higher than the rates on the livestock.

The order of the Commission, made in this case on January 7, 1905, orders the defendants to cease and desist from maintaining or enforcing the relation of rates, "whereby their rates for transportation are higher upon live cattle and live hogs than upon the dressed or prepared products of cattle and hogs on shipments thereof to Chicago, in the State of Illinois, from points on the Missouri River, Sioux City, in the State of Iowa, to Kansas City, in the State of Missouri, inclusive."

Under said order the defendants have the right to accept as low rates upon the products as they may contemporaneously charge upon the livestock.

In the Chattanooga case, the Commission ordered that no greater sum be charged for the carriage of freight to Chatta-

nooga, the shorter distance point, than was exacted to Nashville, the longer distance point; and this Court held that, under such an order, the defendants had the right to continue to exact the current rate to Chattanooga provided the rate to Chattanooga was made the same as to Nashville.

181 U. S., p. 26, E. T. V. & G. Ry. Co. v. I. C. C.

A similar order, in the LaGrange case, was similarly construed by this Court.

190 U. S., p. 284, I. C. C. v. L. & N. R. R.

If, under the law, the rates upon the products of livestock should be higher than the rates upon livestock, the Commission should have so ordered, and should have stated the difference in rates that must be maintained between the two traffics;—provided the Commission has any power to fix relative rates.

If it constitutes unjust preference in favor of the product traffic to charge less rates upon that traffic than upon the live stock traffic it constitutes unjust prejudice to the livestock traffic to charge as high rates upon it as upon the product traffic; and persons interested in the livestock traffic could successfully maintain a complaint based upon the ground that the defendants (though acting in full obedience to the order of the Commission in this case) were giving an undue preference to the product traffic, by accepting as low rates upon that traffic as they charged upon the livestock traffic, when the rates upon the product trafic should be 75 per cent higher than the rates on the livestock traffic.

In the case of I. C. C. v. W. & A. R. R. et al. the United States Circuit Court of Appeals of the Fifth Circuit said:

"If the mere charging of a greater rate for the shorter than for the longer haul, gives an undue and unjust preference to the longer distance points, and subjects the shorter distance points to any undue prejudice or disadvantage, it is difficult to see how the charging exactly the same rate for the shorter haul, than is charged for the longer, shall escape condemnation."

93 Fed. Rep., p. 91, I. C. C. v. W. & A. R. R.

XLI.

The Court Has No Power to Modify the Order of the Commission.

It may be contended by counsel for appellant that the only error committed by the Commission was in not going far enough in favor of the livestock traffic; and that the appellees, therefore, have no right to complain of the error.

Under the sixteenth section of the Act to Regulate Commerce this Court has no power to enforce any order of the Commission unless it be a "lawful order." The question in this Court is not how much error there may be, nor in whose favor the error may be; but is there any material error, for or against any one? It has been repeatedly held that the Court has no power to modify the order of the Commission.

In the case of I. C. C. v. L. S. & M. S. Ry. Co. it was said:

"It has been urged, in behalf of the Commission, that the Court has general equity powers in this cause to make such mandatory injunction, other than the enforcement of the order of the Commission, as will satisfy justice. The act itself confines the action of this Court to the enforcement of the lawful

orders or requirements of the Interstate Commerce Commission. It has been frequently decided in the Federal Courts that, under the act, the function of the Court is to enforce or to refuse to enforce, the order of the Commission as made; that the Court cannot amend or modify an order, or make another order; that the Federal Court has no revisory power over the orders of the Commission; and that it cannot undertake to decide whether the respondents have violated an order which the Commission might lawfully have made."

134 Fed. Rep., p. 947, I. C. C. v. L. S. & M. S. Ry. Co.
64 Fed. Rep., p. 723, I. C. C. v. D. L. & W. R. Co.
73 Fed. Rep., p. 409, I. C. C v. L. & N. R. R.
74 Fed. Rep., p. 841, D. G. H. & M. Ry. v. I. C. C.

XLII.

The Law Does Not Require that Rates Should Be Made with Reference to the Interests of Any Particular Market or Markets.

Mr. Tomlinson, the chief expert witness for appellant, states the real gist of the complaint in this case as follows:

"In other words, the markets in the West have grown much faster than has Chicago."

Trans., p. 1561.

The Commission, in its Report and Opinion, concedes that the relation of rates "should not be adjusted with reference to the interests of any particular market or markets;" it says that "relatively just and reasonable rates should be established, regardless of results that may ensue;" and that "the livestock

should be allowed to go wherever it will under such circumstances."

Rep. & O., Trans., p. 45.

Appellant relies upon the alleged fact that the markets in the West have grown faster than Chicago, as evidence that the relation of rates complained of is not just and reasonable; whereas if it be a fact that the Chicago livestock market has not grown so fast as the Western markets, which are located in the center of the livestock territory, it is evidence that the relation of rates is just and reasonable; because it prevents Chicago from securing a monopoly of the livestock traffic, and permits the livestock to be slaughtered near where it is raised.

XLIII.

In Determining the Question of Undue Preference, the Interests of Chicago are Not Alone to be Considered.

In the case of T. & P. Ry. v. I. C. C., known as the "Import Case," this Court said:

"We read the act in question to direct the Commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case—among which are to be considered the welfare and advantage of the common carrier and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried;" . . . . "all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, ship-

pers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act."

162 U. S., pp. 218, 219, T. & P. Ry. v. I. C. C.

The determination of a case like the one at bar, calls into play the attributes of the statesman, as well as those of the jurist. Such a case cannot be decided upon mere mathematical calculations, based upon interminable labyrinths of facts; nor can it be decided by taking a microscopical view of a single point on the map of the United States, like the city of Chicago.

From the above language of this Court it will be seen that the Court must consider not only the interests of Chicago, but also the interests of producers of livestock; the interests of shippers of livestock; the interests of consumers of livestock; and the interests of the carriers of livestock. The decision at last must be controlled by whatever may be found to be "the greatest good to the greatest number."

I shall assume for the purposes of this section of my argument that the rate adjustment complained of has had the effect to divert a portion of the livestock from Chicago to the western markets on the Missouri River.

It appears that, within a comparatively recent period, packing-houses have been established at a number of points on the Missouri River; that said packing-houses are of modern construction and equipment; and that some of the persons who own packing-houses in Chicago also own packing-houses at Missouri River points.

It appears that members of the Chicago Livestock Exchange

act as commission men in the sale of livestock at Chicago; that they receive certain commissions for their services; and that some of them have offices or agencies at some of the Missouri River points. It also appears that the Union Stockyards Company of Chicago receives almost all of the livestock brought to Chicago and charges for unloading and handling the stock.

FIRST.

The following persons are interested against the present rate adjustment, assuming, for argument's sake, that its tendency has been to divert a portion of the livestock to the Western markets:

(1) The Union Stockyards Company. It is interested in having all of the livestock produced in the United States brought to Chicago.

(2) Such members of the Chicago Livestock Exchange as have no offices or agencies on the Missouri River. They also are interested in having all the livestock brought to Chicago.

(3) Such Chicago packers as have no packing-houses on the Missouri River. They also are interested in having all livestock brought to Chicago.

SECOND.

The following persons are not interested in the present rate adjustments, the one way or the other:

(1) Such members of the Chicago Livestock Exchange as have offices on the Missouri River. They can sell livestock either at Chicago or on the Missouri River, as they may prefer, and earn, presumably, the same commission at either place.

(2) Such Chicago packers as have packing-houses on the Missouri River. They can slaughter livestock at either place, as they may prefer, and, presumably, at the same cost of slaughter.

(3) Purchasers of livestock for export, or for slaughter in the Eastern States. The rates on livestock from Chicago, as well as from the Missouri River, to New York, are lower than the rates on livestock products. (Trans., p. 1737.) In other words, purchasers of livestock for export, or for eastern slaughter, whether they make their purchases at Chicago or at the Missouri River, have lower rates to New York on livestock than are charged on the livestock products; and that is the very kind of adjustment upon which appellant insists in this case.

(4) Purchasers of livestock to be used as feeders. Such livestock is not intended for immediate slaughter; and therefore it in no sense competes with livestock products.

It is a significant fact that none of the persons who are classified by me, as not interested the one way or the other in the present adjustment have appeared at the hearing as witnesses.

THIRD.

The following persons are interested in favor of the present adjustment:

(1) Stockyards located at the various Missouri River markets.

(2) Such members of livestock exchanges on the Missouri River, as have no offices at Chicago.

(3) Such Missouri River packers, and interior packers, as have no packing-houses at Chicago.

(4) All producers of livestock, who live west of Chicago. Their interest is to have the competition of numerous markets in which to sell their stock; instead of being compelled to rely upon Chicago alone.

(5) All consumers of livestock products, the world over. They are interested in having the competition of numerous markets in which to buy. They get meat which is more wholesome when it is slaughtered near the farms where it is produced. And they save the freight from the Missouri River markets to Chicago on the offal and other waste.

(6) The railroads between the Missouri River and Chicago. They cannot increase the rates on the livestock products; and each of them would lose hundreds of thousands of dollars should they be forced to reduce the livestock rates to the level of the product rates.

Crosby, Trans., pp. 245, 279.
Keepers, Trans., p. 416.
Calkins, Trans., p. 536.
Tittemare, Trans., p. 584.
Gower, Trans., p. 750.
McCullough, Trans., pp. 936, 944.

I earnestly insist that upon a "fair consideration" of all the above mentioned interests, the "balance of convenience" is very decidedly in favor of the present adjustment; and if that be so, such prejudice as may exist against Chicago, is not, in contemplation of law, "undue," or "unjust."

XLIV.

The Chicago Great Western Contract Does Not Violate the Anti-Trust Law.

In his printed argument in the Circuit Court, Mr. Shaver, of counsel for appellant, contended that the contract of the Chicago Great Western Company gives to that company a monopoly in the transportation of a certain percentage of the products manufactured on the Missouri River for a period of seven years; and that it restrains trade or commerce, because, for seven years, it withdraws from competition in transportation a certain percentage of the product manufactured on the Missouri River. I quote from said argument as follows:

"It is clear that during the period of seven years the contract in question in this case withdraws from competition in transportation a large part of the product of livestock manufactured on the Missouri River. No other carrier can participate in the transportation of that product, no matter to what extent it may lower its rates. During the period named the transportation of that traffic belongs exclusively under contract to the Chicago Great Western Road."

Mr. Shaver misinterprets the Great Western contract. It does not bind the Missouri River packers to absolutely deliver any percentage of their product traffic to the Great Western Company. They may, at their election, not deliver a single pound of their traffic to that company, provided they prefer to pay to it each month certain liquidated damages provided for in the contract.

Trans., p. 1915.

But if Mr. Shaver's interpretation of the contract be correct, then according to his argument if a railroad company issues its bill of lading obligating itself to transport a carload, or train load, of railroad iron from New York to San Francisco, at a certain rate, it violates the Anti-Trust Law; because "no other carrier can participate in the transportation of said iron, no matter to what extent it may lower its rates;" and "during the period required for the transportation of said iron from New York to San Francisco, the transportation thereof belongs exclusively under the bill of lading, to the company issuing the same." The principle contended for by Mr. Shaver would render every bill of lading, issued for the transportation of interstate traffic, illegal and void. I think it needs no authority, in this Court, to show that such an argument is unsound.

But the appellees, for whom I appear, are not interested in the question as to whether the Great Western contract is legal or illegal; their only interest *is in the rates which the Great Western Company accepts for the transportation of livestock products* from the Missouri River to Chicago. Even if said Great Western contract should be adjudged to be illegal and the parties to said contract should be enjoined from acting under it, the Great Western Company could, entirely independent of said contract, elect to continue to accept rates on the livestock products as low as, or even lower than, the rates specified in said contract; and if said company should elect so to do, the other defendants would be compelled to accept rates no higher than those offered by the Great Western, or they would have to abandon the product traffic to that company.

XLV.

The Rate on Livestock from the Missouri River when Consigned to Chicago Proper is no Higher than the Rate on the Products.

In his printed argument in the Circuit Court, Mr. Shaver, of counsel for appellant, said:

"When the livestock is consigned to Chicago proper, its rate is higher than on the products, but when it goes beyond Chicago the rate for the haul as far as Chicago is the same as that on the products."

In support of his statement Mr. Shaver referred to certain tables in the appendix to his argument which show that the *nominal* local rate on cattle and hogs from Missouri River points to Chicago is 23½ cents, while the actual local rate on packing-house products from the same Missouri River points to Chicago is 20 cents.

The rate of 23½ cents on cattle and hogs is a mere nominal or paper rate, and it is never actually charged.

The Commission in its Report and Opinion says: "Since all, or nearly all, the livestock carried easterly from the Missouri River is shipped there in the first instance from other points, practically no shipments are made from the river to Chicago upon the local rates in force between those points, and such rates are therefore important, principally, because of their effect upon rates from the intermediate points."

Rep. & O., Trans., p. 35.

All of the witnesses who testified upon the point state that livestock consigned from the Missouri River to Chicago proper does not actually pay more than 20 cents per 100 pounds, which is the same as the rate charged on the products; and the adjustment, therefore, is the same as that ordered by the Commission.

In said argument, Mr. Shaver further said:

"Why, when the traffic is shipped on a through rate from west of the Missouri River to points east of the Illincis-Indiana State line, is the proportional rate from the Missouri River to Chicago on the livestock not higher than on the product?"

A sufficient answer to the question is, that even the order of the Commission in this case does not require that the rates on livestock shall be higher than the rates on the product. On the contrary, the order in effect directs that the rates on livestock shall not be higher than the rates on the products.

XLVI.

The Commission Has No Power to Make Relative Rates.

It was twice decided by this Court that the Commission has no power to make specific rates.

167 U. S., 479, I. C. C. v. C. N. O. & T. P. Ry.
162 U. S., p. 197, C. N. O. & T. P Ry. v. I. C. C.

The Commission then attempted to make relative rates; and the U. S. Circuit Court of Appeals for the Eighth Circuit said:

"Prescribing a rate from Pueblo, Col., to San Francisco, Cal.,

by reference to a rate that had theretofore been established by carriers between Chicago and San Francisco, involved the exercise of legislative functions to the same extent as fixing the rate between the former points on an independent consideration of what would be a reasonable compensation for the service."

. . . . . "We feel constrained to hold that the Commission exceeded its authority in this part of the order, and that it had no more power to fix a rate from Pueblo to San Francisco by relation to the theretofore existing rate from Chicago to San Francisco than it had to fix a former rate upon an independent consideration of what would be a reasonable charge."

101 Fed. Rep., pp. 784, 785, Southern Pac. Co. v. Col. Fuel & Iron Co.

To paraphrase the language just quoted, the Commission had no more power to fix a rate on livestock, by relation to the rate on livestock products, than it had to fix the former rate upon an independent consideration of what would be a reasonable charge.

In his printed argument in the Circuit Court, Mr. Shaver, of counsel for appellant, said:

"But the Court will observe that the order does not say what the rate shall be either on the livestock or its product, but leaves it to the discretion of the defendants to determine how the unlawful relation may be remedied. That may be done either by advancing the product rates or by reducing the livestock rates, or by both such advance and reduction in certain proportions." . . . . "The order requires, when considered as a whole and when the body of the report of the Commission is considered, simply that whatever rates the defendants may establish on the livestock shall not be higher than the rates on the product."

It is "true that the order does not say what the rates shall be either on the livestock or its product;" but, as conceded by Mr. Shaver, the order does require "that whatever rates the defendants may establish on the livestock shall not be higher than the rates on the product." The Commission does, therefore, expressly make or fix the rates which the defendants "shall" *in the future charge* on the livestock, by ordering that such rates "shall" not *in the future* be higher than the rates on the product.

The cases above cited in this section show that the Commission has no more power to fix *a future rate* on livestock, by relation to the rate on its products, than it has to fix the former rate upon an independent consideration of what would be a reasonable charge

The Commission has the power to express its opinion as to whether the present relation between the rates on livestock and the rates on the product is undue or unreasonable; but it has no power to even express an opinion as to whether the present relation will *in the future* be undue or unreasonable; and that is precisely what the Commission assumed to do in this case.

In the case of I. C. C. v. C. N. O & T. P. Ry. Co., this Court said:

"It will be perceived that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should control *in the future*, and their application to the Court was for a mandamus to compel the companies to comply with their decision—that is, to abide by their legislative determination as to the maximum rates to be observed *in the future*."

167 U. S., p. 500, I. C. C. v. C. N. O. & T. P. Ry. Co.

Again, this Court said:

"If there were nothing else in the act than the first section

commanding reasonable rates, and the twelfth empowering the Commission to execute and enforce the provisions of the act, we should be of the opinion that Congress did not intend to give to the Commission the power to prescribe any tariff and determine what *for the future* should be reasonable and just rates. The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative."

167 U. S., p. 501, I. C. C. v. C. N. O. & T. P. Ry. Co.

This Court, commenting upon Section 6 of the Act to Regulate Commerce, said:

"It will be perceived that the section contemplates a change in rates (i. e., by the carrier) either by increase or reduction, and provides the conditions therefor; but of what significance is the grant of this privilege to the carrier if the *future* rate has been prescribed by an order of the Commission, and compliance with that order enforced by a judgment of the Court in mandamus? The very idea of an order prescribing rates *for the future*, and a judgment of the Court directing compliance with that order, is one of permanence." . . . . "Incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission or invest it with the power to exercise the legislative function of prescribing rates which shall control *in the future*." . . . . "The grant to the Commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff *for the future* is not among the powers granted to the Commission."

"These considerations convince us that under the Interstate Commerce Act the Commission has no power to prescribe the tariff of rates which shall control *in the future*, and, therefore, cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed."

167 U. S. pp. 505, 506, I. C. C. v. C. N. O. & T. P. Ry. Co.

It is true that in the case then before this Court the rates which the Commission had attempted to prescribe were what are called "specific rates," whereas in the case at bar the rates which the Commission has attempted to prescribe are what are called "relative rates;" but it will be noticed that the case before this Court did not turn upon the question whether the rates were "specific" or "relative;" and that the only question was as to the right of the Commission to prescribe *any* kind of rates, either "specific" or "relative," which "shall control *in the future*."

This Court, referring to an argument contained in an opinion rendered by Commissioner Cooley, said:

"We think that nearly all of the argument which he makes to show that the Commission has no power to fix a minimum or establish an absolute rate, goes also to show that it has no power to prescribe *any* tariff, or fix *any* rate to control *in the future*."

167 U. S., p. 511, I. C. C. v. C. N. O. & T. P. Ry. Co.

Whether specific rates or relative rates now in effect are undue or unreasonable is a judicial question to be determined by the circumstances and conditions now or heretofore existing; but whether certain specific or relative rates will be just and reasonable in the future is a legislative question which cannot be determined in advance either by the judiciary or by the Interstate Commerce Commission.

In the language of this Court, "it is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

167 U. S., p. 499, I. C. C. v. C. N. O. & T. P. Ry. Co.

The order of the Commission in the case at bar, instead of confining itself to a determination that the present relation of rates between livestock and its products is undue or unreasonable (which would be a judicial act); assumes to go farther, and to order, as conceded by Mr. Shaver, that in the future "whatever rates the defendants may establish on the livestock shall not be higher than the rates on the products" (which is a legislative act).

Whether the present relation between the rates on livestock and the rates on its product is undue or unreasonable, must be determined by the facts and circumstances which are now existing; and those facts and circumstances can be ascertained from the testimony either by the Commission or by the Court.

But, whether the same relation will be undue or unreasonable in the future, can only be determined *by the facts and circumstances which may exist in the future;* and as neither the Commission nor the Court can foretell what those facts and circumstances will be, it is impossible to judicially determine now whether such future relation will or will not be undue or unreasonable.

Congress being the legislative department of the government, may have the power, either by direct enactment or through the instrumentality of the Interstate Commerce Commission, to declare what shall in the future be deemed to be just and reasonable rates, whether "specific" or "relative." By the act approved June 29, 1906, Congress has assumed to confer that power upon the Commission; but that act was not in force when the proceedings in this case were had.

XLVII.

The Missouri River Packer Has No Undue Advantage of the Shipper of Livestock.

In his printed argument in the Circuit Court, Mr. Shaver, of counsel for appellant, said:

"Manifestly, lower rates on the product than on the livestock makes it cheaper to slaughter the stock at the river and then ship the product on to Chicago or to the East under the reduced rate. Take the following as an example:

"A live steer of the weight of 1,000 pounds gross.

"The livestock rate of 23½ cents per 100 pounds on this gross weight of 1,000 pounds amounts to an aggregate of $2.35.

"Take the amount of the product in this steer which can be made merchantable as 70 per cent, or 700 pounds.

"The aggregate rate of $2.35 on the 1,000 pounds gross weight, when applied to the 700 pounds as product, amounts to 33 4-7 cents per 100 pounds.

"The rate on prepared product is 20 cents per 100 pounds or less.

"Deduct 20 cents from 33 4-7 cents and we have 13 4-7 cents per 100 pounds as the excess of the rate on the crude product in the live steer over the rate on the product manufactured at the Missouri River.

"To the extent of 13 4-7 cents per 100 pounds the Missouri River packer, or shipper of the prepared product, has the ad-

vantage of the shipper of the crude product in the live steer from the river, or from the territory east of the river in which the 23½ cent rate prevails. The shipper of the live steer in the above example pays the full rate on 300 pounds of valueless matter."

The example put by Mr. Shaver assumes that the steer is slaughtered at the Missouri River; and he compares the actual rate from the Missouri River to Chicago on the product, with the nominal rate from the Missouri River to Chicago on the live-stock. He assumes that the rate from the Missouri River to Chicago on live-stock is 23½ cents.

It is true that there is a nominal local rate from the Missouri River to Chicago on live stock of 23½ cents; but the Commission finds and reports that "since all or nearly all the livestock carried easterly from the Missouri River is shipped there in the first instance from other points, practically no shipments are made from the river to Chicago upon the local rates in force between those points, and such rates are therefore important principally because of their effect upon rates from the intermediate points."

Rep. & O., Trans., p. 35.

In the table of rates hereinbefore set forth in Section IX it is shown that the rate applicable on shipments of livestock from the Missouri River to Chicago, when such shipments move to the Missouri River from other points, is 20 cents per 100 pounds; and not 23½ cents as stated in Mr. Shaver's example.

The rate on the prepared product from the Missouri River to Chicago is, as conceded by Mr. Shaver, 20 cents per 100 pounds. It follows that where a shipment of livestock, and a shipment of product, are both made from the Missouri River to Chicago, the rate is the same, viz.: 20 cents per 100 pounds; which adjustment

fully complies with the order made by the Commission in the case at bar.

And so, if a shipment of livestock, and a shipment of the product are both made from the Missouri River to points east of Chicago (i. e. points east of the Indiana-Illinois State line), the rate is the same, viz.: 18.5 cents per 100 pounds, which adjustment also fully complies with said order of the Commission.

Trans., pp. 237, 398, 505.

But even if it were true, as assumed by Mr. Shaver, that the Missouri River packer, or shipper of the prepared product, has under the present adjustment, some advantage of the shipper of livestock, such advantage or preference is not *undue;* because it is a mere *incidental* effect resulting from the reduction made by the Great Western Company in the product rates; which reduction was forced upon that company by the competition then existing; and which reduction was necessary to enable that company to secure what was considered to be its fair share of the product traffic.

181 U. S. pp. 18, 19, E. T. V. & G. Ry. Co. v. I. C. C.

XLVIII.

The Fact that Chicago Receives a Greater Proportion of the Livestock than is Received by the Missouri River Markets is Evidence that the Rate Adjustment is Fair to Chicago.

In his printed argument in the Circuit Court, Mr. Shaver, of counsel for appellant, said:

"The fact that Chicago receives a greater proportion than the other (Missouri River) points notwithstanding the rate adjustment, is no justification of that rate adjustment if it is unfair or

unduly preferential; a fleet horse frequently wins although heavily handicapped."

Of course, if the rate adjustment is in truth unfair, or unduly preferential, the fact that Chicago receives a greater proportion of the livestock is no justification of such adjustment; but the fact that Chicago receives a greater proportion of the livestock is highly persuasive evidence that the adjustment is neither unfair to Chicago nor unduly preferential to the Missouri River markets. Though a fleet horse may sometimes win, although heavily handicapped, the fact that a fleet horse wins is at least presumptive evidence that he was not too heavily handicapped

XLIX.

The Fact that Rates are Unreasonably Low is Not Conclusive that There is No Profit in Them.

In his printed argument in the Circuit Court, Mr. Shaver, of counsel for appellant, said: "It is claimed that the rates on both the live stock and the products are unreasonably low, and that there is no profit in them, and yet in the very next breath it is said that if the order of the Commission is complied with, by advancing the product rates, it will work irreparable damage to the carriers by diverting the traffic to other lines. In other words, the diversion of a traffic in which there is no profit will work irreparable damage. This, to say the least, taxes our credulity and smacks of inconsistency."

While we do claim "that the rates on both the live stock and the products are unreasonably low," we have never claimed "that there is *no* profit in them."

It was proven in the Circuit Court by Mr. Ripley and by Mr. Peabody, and illustrated by certain exhibits filed by Mr. Ripley,

that neither the live stock rates nor the product rates pay their proper proportion of the "total transportation cost" (which includes interest and taxes), or even their proportion of the "total operating cost" (which excludes interest and taxes). (Trans., pp. 1104, 1105, 1106, 1222, 1223.) For that reason we claim that said rates are unreasonably low. Every article transported by a railroad should pay not only its proportion of "total operating cost," but also its proportion of "total transportation cost," including interest and taxes; and where the rate upon any article fails to accomplish that result, such rate is "unreasonably low," and should be raised if competition will permit it to be done.

But while Mr. Ripley and Mr. Peabody testified that neither the live stock rates, nor the product rates, pay their proper proportion of the "total transportation cost," or even their proportion of the "total operating cost," they also testified that all of said rates pay some profit over and above the "movement cost," which means the cost or expense of the mere movement of that particular traffic. (Trans., pp. 1104, 1231, 1232.) Whatever such profit may amount to, it is to the interest of the public, as well as of the carrier, that the carrier should be allowed to earn it.

In the case of the E. T. V. & G. Ry. Co. v. I. C. C., this Court said:

"There is a conceded margin of profit in the rates now in force to Nashville and Memphis with reference *to the additional expense incurred in carrying eastern traffic to those destinations.*" . . . . . "To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public."

181 U. S., p. 20, E. T. V. & G. Ry. Co. v. I. C. C.

L.

THE PRESENT RATE ADJUSTMENT WAS NOT MADE WITH A VIEW OF PROMOTING ANY SET OF MARKETS OR INTERESTS.

In his printed argument in the Circuit Court, Mr. Shaver, of counsel for appellant, said:

"We think the carriers are going beyond their legitimate sphere of action and are treading upon dangerous ground, when they undertake to establish a rate or make a rate adjustment *with a view* of promoting any set of markets or interests."

I have shown hereinbefore in Section XXIX that the present rate adjustment was forced upon the other carriers by the action of the Great Western Company in reducing the rates upon livestock products; and that said company was forced by the competition then existing to make said reduction in order to secure its proportion of the product traffic. I have shown in Section XXXIII that said reduction was not made *with the object or view* of promoting any set of markets or interests; and that the only object or view which that company had in mind was to secure its share of the product traffic, and prevent said traffic from being entirely absorbed by the competitors of that company.

LI.

THE COMMISSION DID NOT GIVE DUE WEIGHT TO THE COMPETITION RELIED UPON IN THIS CASE.

In his printed argument in the Circuit Court, Mr. Shaver, of counsel for appellant, said:

"In the present case it (the Commission) considered the competition set up and held it to be insufficient to justify the reduction in the product rate," etc.

"That the Commission considered and gave due weight to the competition set up in this case appears from the whole tenor of its Report and Opinion."

After quoting several extracts from said Report and Opinion, he further said :

"It is clear from these quotations (and others that might be made) that the Commission considered the competition brought about by (the) contract of the Chicago Great Western Company, and held that competition to be insufficient or not of a character to justify what it (the Commission) found to be the unjust discrimination in rates resulting from that contract."

A similar argument was made by the same counsel in the "LaGrange" case.

That case was originated by a petition filed before the Commission by Fuller E. Calloway against the L. & N. R. R. Co. and others.

In the report and opinion of the Commission rendered in that case, the Commission expressly recited that it had "fully considered all the evidence and material facts and given due weight to the competition of carriers and of markets for Atlanta trade, together with the fair interests of the defendant carriers, the interests of the communities involved, and those of the complainant and other dealers concerned."

7 I. C. Rep., p. 438, Calloway v. L. & N. R. R. Co.

But notwithstanding such express recital, this Court reversed the Commission, "upon the error of law committed by the Commission when it decided that the railroad companies were powerless to consider the competitive rates prevailing at Atlanta," etc.

190 U. S., p. 283, I. C. C. v. L. & N. R. R. Co.

So, in the case at bar, we ask this Court to affirm the decree of the court below, and reverse the Commission upon the error of law committed by the Commission when it decided that the appellees were powerless to consider the competitive circumstances and conditions which affected the rates upon the livestock product.

LII.

The "Social Circle Case" Has, in Effect, Been Overruled.

In his printed argument in the Circuit Court, Mr. Shaver, of counsel for appellant, referred to the case known as the "Social Circle Case," as authority for the proposition that the question as to whether the competitive circumstances and conditions in a given case are so dissimilar as to justify the rates charged, "is one of fact peculiarly within the province of the Commission," whose conclusions thereon will not be reversed by the Court.

In the "Social Circle case" this Court said that the conclusions of the Commission had "been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion."

162 U. S., p. 194, C. N. O. & T. P. Ry. v. I. C. C.

But, in the case at bar, the conclusions of the Commission have not been accepted or approved by the Circuit Court of Appeals, or by any other court. On the contrary they have been disapproved by the court below, and the question now up for decision, is whether the conclusions of the Commission or of the Circuit Court shall be accepted or approved by this Court.

His Honor Judge Bethea required that the witnesses be

brought before him; and nearly six weeks were consumed in examining them orally in his presence. He gave to the matter the most thorough and painstaking investigation possible.

In the "Behlmer case," the "Social Circle case" was relied upon by counsel for the Commission. It was argued in the "Behlmer case," that the state of the record in the "Social Circle case" was such that an analysis of the action taken below might have well led this Court to a different opinion; in other words, might have justified this Court in the holding that both the Commission and the Circuit Court of Appeals had rested their conclusions, in the "Social Circle case," not on the want of proof as to the claimed competition, but solely on the absence of legal power to assert competition of the character relied on; but this Court replied that even if such argument were conceded, it could have no influence upon the decision of the "Behlmer case." "Because the only deduction possible from the proposition would be that the particular case (i. e. the Social Circle case) had been decided on a question of fact, when it should have been controlled by a question of law, which would afford no reason for the failure to apply sound principles of law to the facts of this record. It involves a complete *non sequitur* to assert that because legal principles may not have been applied to a given case on the assumption that the facts did not render their application necessary, therefore, in future cases, where it was found that the facts brought the controversy within the principles, they should not be applied."

175 U. S., p. 673, L. & N. R. R. Co. v. Behlmer.

I insist that the language just quoted in effect overruled the "Social Circle case;" and it is certain that the "Social Circle case" cannot be reconciled with the subsequent cases decided by this Court, and which are referred to in Section XXII of this argument.

LIII.

The Order of the Commission is Not Conclusive Upon this Court.

In his printed argument in the Circuit Court Mr. Shaver, of counsel for appellant, contended that the order of the Commission is *prima facie* lawful, and that the burden is upon appellees to show clearly to the satisfaction of the Court that it is unlawful. Mr. Shaver admitted, in effect, that the Act to Regulate Commerce only makes the "findings of fact" *prima facie* evidence. He cited several cases decided at Circuit as holding that "the conclusions of the Commission based upon their findings of fact" are also "presumed to be well founded and correct;" but he admitted that those courts "have gone further" than the statute. Certainly none of said cases has ever been affirmed by this Court.

The first case cited by him is the I. C. C. v. L. & N. R. R. Co., 102 Fed. Rep., pp. 709, 710, the opinion in which at Circuit was rendered by District Judge Toulmin. Judge Toulmin originated the proposition that the "*conclusions*" of the Commission are presumed to be correct, and he, of course, cited no authority to sustain him. His decision in that case was reversed both by the Circuit Court of Appeals and by this Court; though neither of said courts noticed the proposition originated by him.

190 U. S., pp. 273, 279, I. C. C. v. L. & N. R. R. Co.

The next case cited by Mr. Shaver is the I. C. C. v. L. & N. R. R. Co., 118 Fed. Rep., p. 613. The decision in that case was rendered by District Judge Speer; he quotes the proposition, as announced in Judge Toulmin's opinion, but cites no other authority in support of it. The decision of Judge Speer was ap-

pealed from by defendants. They afterwards dismissed the appeal, not because they thought that either the Commission or Judge Speer was correct in the opinions rendered by them respectively in that case, but because they became satisfied that even if they should make their rates on the plan suggested by the Commission, the great bulk of the traffic would still move to Pensacola in preference to Savannah; and subsequent events have shown that they were correct.

It appeared in that case that the L. & N. R. R. owned a line of railroad running from Pensacola eastwardly to River Junction, a distance of 161 miles, and known as its Pensacola & Atlantic Division; and that said company was interested in having the traffic, which originates on said division, move to Pensacola, a port on its own line, in preference to Savannah, which is not located on its line, but is located 259 miles east of River Junction which is the extreme eastern terminus of the L. & N. R. R.

The Savannah Bureau of Freight & Transportation filed a petition before the Interstate Commerce Commission, the object of which was to compel the L. & N. R. R. Co. to readjust its rates from stations on the Pensacola & Atlantic Division, so that cotton and naval stores originating on said division would move to Savannah, a port in which the L. & N. R. R. was not interested, in preference to Pensacola, in which the L. & N. R. R. was very greatly interested.

The Commission decided in favor of Savannah, and ordered an adjustment of rates, which the L. & N. R. R. at first supposed would move the traffic to Savannah in preference to Pensacola. Judge Speer affirmed the order of the Commission and the L. & N. R. R. and other defendants appealed. But upon further investigation the L. & N. R. R. became satisfied that even under the adjustment as ordered by the Commission the great bulk of

the traffic would still move to Pensacola instead of Savannah; and as the L. & N. R. R. could accomplish its purpose as well by conforming to the order of the Commission, as it could by reversing Judge Speer, it concluded that the appeal would be thenceforth a mere moot court proceeding, and dismissed it as of no further use.

Mr. Shaver, in his printed argument, also referred to the case of E. T. V. & G. Ry. Co. v. I. C. C., 99 Fed. Rep., p. 664, in the Circuit Court of Appeals for the Fifth Circuit, and quotes an extract from the opinion of Judge Taft in which he describes the Interstate Commerce Commission as an "expert tribunal." Mr. Shaver also refers to the case of I. C. C. v. Southern Pacific Co. et al., 123 Fed. Rep., p. 603, in which District Judge Wellborn concurs with Judge Taft in describing the Interstate Commerce Commission as "an expert tribunal;" but neither Judge Taft nor Judge Wellborn approved the proposition originated by Judge Toulmin to the effect that the *conclusions* of the Commission are presumed to be well founded and correct, and will not be set aside unless error clearly appears. That proposition has no support except from Judge Toulmin and Judge Speer.

The conclusions of the Interstate Commerce Commission have been repeatedly set aside by this Court as shown by the cases referred to in Section XXII of this argument, and in none of those cases did the error of the Commission appear any more "clearly" than it appears in the case at bar.

Respectfully submitted,

ED. BAXTER,

Solicitor for Appellees as of Record.

No. 352.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

THE CHICAGO GREAT WESTERN RAILWAY COMPANY, Et Al., *Appellees.*

Appealed from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR THE APPELLANT THE INTERSTATE COMMERCE COMMISSION.

[REFERENCES ARE TO PRINTED RECORD.]

I.

STATEMENT.

This suit was brought by the complainant, the Interstate Commerce Commission, against the appellees, in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, on the 29th day of April, 1905, being Cause No. 27723, on the docket of said Court, under and by virtue of the act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended March 2, 1899, to

secure an injunction to compel obedience to the order of the Interstate Commerce Commission made by it against the appellees on the 7th day of January, 1905, whereby the appellees were commanded to cease and desist on or before the 15th day of February, 1905, from violating Sections 2 and 3 of said Act, by maintaining or enforcing higher rates of freight upon live cattle and live hogs than upon the dressed products thereof, on shipments to Chicago from points on the Missouri River between Sioux City, and Kansas City, inclusive, and from South St. Paul, and from points in the territory between the Missouri River and Chicago, and between South St. Paul and Chicago, which by the report and opinion of the Commission in the proceedings brought against the appellees by the Chicago Live Stock Exchange, in which the said order of the Commission was made, the charging of higher rates for live cattle and hogs than for the said products thereof was held to be a violation of Sections 2 and 3 of said Act.

The proceeding in which the said order was issued upon which this suit was brought was begun before the Interstate Commerce Commission by the petition of the Chicago Live Stock Exchange in April, 1902, filed in accordance with Section 13 of said Act, and charged the violation of Sections 1, 2 and 3, by the appellees, who were defendants therein, the complaint charging that the higher rate of freight upon live stock from said Missouri River points, from South St. Paul, and from the points intermediate between Missouri River and Chicago, and intermediate between South St. Paul and Chicago, than was charged upon the dressed meat and the prepared product, commonly called packing house products, violated Sections 2 and 3 of said Act, in that it was an unlawful discrimination against shippers of the live stock to Chicago, and gave to the shippers of the dressed meat and packing house products an undue and unreasonable preference and advantage as against the shippers of live stock to Chicago, and subjected the latter to an unjust and unreasonable prejudice and disadvantage; and that it subjected Chicago and the market at Chicago, the Chicago Live Stock Exchange and its members, who were engaged in the business of selling live stock on commission,

and the owners of live stock and shippers thereof, to an unjust and unreasonable prejudice and disadvantage, and gave an undue and unreasonable preference and advantage to the shippers of dressed meat and packing house products from the said Missouri River points and from South St. Paul to the localities and markets and persons engaged in a like business at the said locality on the Missouri River and at South St. Paul. (Pr. Rec., Exhibit A, p. 9.)

The several defendants in said proceedings answered therein denying the allegations of the complaint (Exhibits B, C, D, E, F, G, H, I, J, K, L, N, and O, Pr. Rec. pp. 11 to 27), except the Chicago and Northwestern Railway Company. After due notice in accordance with the provisions of the said Act to Regulate Commerce, the Interstate Commerce Commission on January 7th, 1905, filed its report and opinion therein, including its findings of fact and made the order which is the foundation of this suit, which is likewise made a part of the Appellant's Bill as Exhibit P (Pr. Rec. pp. 28 to 47) and Exhibit Q (Pr. Rec. pp. 47-49).

The order made the basis of the suit is as follows:

ORDER OF COMMISSION.

"This case being an issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report and opinion containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order:

It is ordered, that, in accordance with said report and opinion, the present relation of rates maintained and enforced by defendants, the Chicago Great Western Railway Company; the Burlington, Cedar Rapids and Northern Railway Company; the Chicago, St. Paul, Minneapolis and Omaha Railway Company; the Chicago and Alton Railway Company; the Chicago and Northwestern Railway Company; the Chicago, Burlington and Quincy Railroad Company; the Chicago, Milwaukee and

St. Paul Railway Company; the Chicago, Rock Island and Pacific Railway Company; the Hannibal and St. Joseph Railroad Company; the Illinois Central Railroad Company; the Iowa Central Railway Company; the Kansas City, St. Joseph and Council Bluffs Railroad Company; the Minneapolis and St. Louis Railroad Company; the Missouri Pacific Railway Company; the Missouri, Kansas and Texas Railway Company; the Omaha, Kansas City and Eastern Railroad Company; the Wabash Railroad Company, and the Wisconsin Central Railway Company, whereby their rates for transportation are higher upon live cattle and live hogs than upon the dressed or prepared products of cattle and hogs on shipments thereof to Chicago, in the State of Illinois, from points on the Missouri River, Sioux City, in the State of Iowa, to Kansas City, in the State of Missouri, inclusive, and from South St. Paul, in the State of Minnesota, or from points in the territory between the Missouri River or South St. Paul and Chicago, constitutes wrongful prejudice and discrimination, in violation of the provisions of the act to regulate commerce; and that said defendants be, and each of them is hereby, notified and required to cease and desist, on or before the 15th day of February, 1905, from maintaining or enforcing the said unlawful relation of rates, and from further continuing said unlawful prejudice and discrimination.

And it is further ordered, that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the Commission herein, in conformity with the provisions of section 15 of the Act to Regulate Commerce."

After having been duly served with subpoena, each of the defendants who are appellees herein, made due answer to said petition filed in the Circuit Court, which were all alike in substance, and which admit that said order of the Commission was duly made in said proceeding as above set forth, and had been duly served upon each of the defendants, and that they each refused at all times to comply therewith, but denied that the order of the Commission was a lawful order and

alleged that the same was in violation of the rights of the defendants and for that reason that they had not complied with the same.

They denied that the higher rates of freight upon live cattle and hogs than upon the dressed meats and the prepared products thereof created an undue and unreasonable prejudice or constituted an unjust discrimination in violation of Sections 2 and 3 of said Act to Regulate Commerce, but alleged that said order was not justified by the evidence produced before the Commission on said hearing, or by the facts, and that the same was unlawful and not within the jurisdiction of the Commission, and that it was unreasonable as to each defendant and a violation of its rights, for the reasons: (1) that the said rates on live stock were very low, and that no complaint had at any time been made by any shipper of live stock of said rates; (2) that each of the defendants had been obliged to make such rates and charges for the transportation of the dressed meats and prepared products because of the competitive conditions on Missouri River and South St. Paul in respect thereto, to meet the rates put in force by its competitors, and that the order of the Commission seeking to compel each defendant to make the same rate for the live animals is unreasonable and unlawful because it could only be complied with by a reduction of the rates on live animals, thereby compelling the defendant to make its rates and charges too low to be reasonable; (3) that competition of roads leading to other lake ports than the Gulf of Mexico, on such products, required the present rate on the products to meet that competition, and also that there are proportional rates upon which live stock originating west of Missouri River was shipped east thereof, which are all lower ~~higher~~ than the said rates on the dressed meat and packing house products from Missouri River to Chicago, and that all live stock shipped from Missouri River to Chicago are shipped upon such proportional rates; (4) that the rates on live stock complained of are not unreasonably high and cannot be reduced without making them unremunerative, which would deprive the defendants of their property without due process of law; (5) that the public interest and the maintenance of

market towns on the Missouri River and between there and Chicago required the maintenance of the existing relation of rates, and to comply with the order of the Commission would injure or destroy such markets and deprive the stock growers of that territory of the benefit and advantages of the markets, and that, therefore, they protested against the establishment of the relation of rates as ordered by the Commission; and (6) that the conditions surrounding the transportation of cattle and hogs differed so materially from the conditions surrounding the transportation of dressed and prepared products thereof, that the rate of the one could not be made the basis of the rates of the other.

In addition to the foregoing all of the defendants, except the Chicago Great Western Railway, also alleged that on August 8, 1902, one of their competitors (meaning the Chicago Great Western) entered into a contract with the shippers of dressed and prepared products, cattle and hogs, from Missouri River to Chicago, whereby said competitor agreed to carry for a long term the said dressed and prepared products to Chicago for the rate of 20 cents per hundred pounds; and that each of the defendants was compelled, in order to obtain any portion of the traffic, to put in force similar rates, and that, therefore, the establishment of the rates upon the dressed and prepared products by each of the defendants, other than the Chicago Great Western Railway, was the result of conditions beyond the control of either defendant, other than the Chicago Great Western Railway, and that to compel it to establish the relation of rates ordered by the Commission could only be complied with by a reduction of the rates on cattle and hogs, which are alleged to be now reasonable, and that the effect would be to compel their transportation at less than a reasonable rate; that being compelled by the competition growing out of said contract to charge the present rates on the dressed and prepared product, of such live stock, it is not unlawful for the said defendants to do so, and it does not constitute any undue or unreasonable prejudice or disadvantage against the shippers of cattle or hogs to Chicago in violation of Section 3 of said Act.

Intervening petitions were filed by the Union Stock Yards Company of Chicago, Sinclair & Co., Ltd., St. Joseph Stock Yards Company, St. Paul Union Stock Yards Company, Sioux City Stock Yards Company, and the Railroad and Warehouse Commissioners of Minnesota.

These petitions presented no material matter not arising upon the petition and answers and otherwise upon the record, and therefore will not be further considered in this statement.

After the filing of the said petition to enforce the order of the Commission as aforesaid, and the answers thereto, and on the —— day of August, 1905, the Commission also filed a petition as an original proceeding (being No. 27829) in the said Circuit Court under and by virtue of the Act of Feb. 19, 1903, known as the Elkins Act, wherein it alleged that the same defendants by demanding, charging and collecting the higher rate of freight for the transportation of live stock than for the transportation of the dressed meat and prepared products from the said Missouri River and intermediate points, and South St. Paul and intermediate points to Chicago, were thereby discriminating against the shippers of the live stock and persons engaged in business at that market, and in favor of the shippers of the dressed meats and packing house products, on the Missouri River and South St. Paul, and sought an injunction against the continuation of said discrimination.

Pleas for each of the defendants were filed to the last mentioned petition, wherein they sought to abate the same by reason of the pendency of said cause No. 27723, but these pleas were overruled and thereupon answers were filed thereto in substance the same as the answers to this petition.

(All proceedings in Cause No. 27829 are omitted from the printed Record because of the cost of printing, and because the decision of the questions involved in this cause 27723 disposed of all of the points raised in that case.)

The cases were consolidated and came on for hearing before the Honorable S. H. Bethea, District Judge, presiding and holding the Circuit Court of the United States for the Northern District of Illinois, sitting in chancery, on the 15th day of September, 1905, and the evidence was duly taken before said

Judge in open court at the hearing from time to time, and from day to day, and was completed on the 15th day of October, 1905, as shown by the printed Record and certificate of evidence, pp. 2067, 2068.

On the 20th day of November, 1905, the Honorable S. H. Bethea filed in said cause his opinion, decision and findings of fact therein (Rec. p. 177), wherein it was held that the bills should be dismissed. A decree was therefore accordingly so made. (Rec. pp. 178, 179.)

The complainant rested its case on the report, opinion and order of the Commission (Rec. pp. 209, 195), thereupon the defendants introduced voluminous evidence bearing mainly upon the earnings, cost of the service and profits relatively between dressed meat and packing house products, on the one hand, and cattle and hogs on the other, which was rebutted by complainant. The evidence comprises about 1,900 pages of the printed record, of which we submit an analysis following the findings of the Commission, and opinion of the Court.

II.

FINDINGS OF THE COMMISSION.

(Rec. pp. 30 to 47.)

Chicago is now and for many years has been the largest live-stock market in the United States; but during recent years packing houses have been erected and important live-stock markets built up at South St. Paul, Minn., Sioux City, Iowa, South Omaha, Neb., South St. Joseph and Kansas City, Mo., and at other points on the Missouri River. There are also many packing houses and live-stock markets of importance at different points in the territory lying between Chicago and the Missouri River. To a very large extent all these markets receive their supply of live stock from the same territory; that is to say, from points in states west of Chicago and east of the Rocky Mountains. An important portion of the products is shipped by way of Chicago and the Atlantic Seaboard to foreign countries and large shipments are also made by way of Chicago to consuming markets in the eastern part of the United States. Under these circumstances, the importance of

establishing and enforcing rates for the transportation of live stock and its products that are relatively just and reasonable will be readily observed. The higher the rate on the live stock compared with the rate on the products, the greater the difficulty of moving the former and the more freely the latter will move, over long distances. To illustrate: Other things being equal, if Chicago, compared with Kansas City, is 100 miles nearer the consuming market but 100 miles farther from the point where the live stock is raised, whether or not the live stock will be slaughtered at Chicago will depend largely upon whether or not the rate on live stock to Chicago plus the rate on the products from Chicago to the consuming market is more than the rate on the live stock to Kansas City plus the rate on the products from Kansas City to the consuming market.

Efforts to buy and sell in common territory, made by parties located and doing business at different points outside of that territory is called market competition; but market competition, so far as it relates to rates of transportation, can be made effective only through the instrumentality of common carriers. It often happens that the interests of carriers serving the same territory are in conflict, and under such circumstances, one carrier will sometimes make a rate on a particular kind of traffic that will result in considerable injury to persons and localities interested in another kind of traffic, and also to competing carriers, and, apparently, this is what has happened in the present case.

Live stock and its products are in sharp competition with each other in the different markets, and some of the defendants are more interested in the former than in the latter and vice versa. Those whose lines reach Chicago and also run through live-stock districts in states west, northwest and southwest of the Missouri River desire the long haul they will obtain if the live stock is shipped to Chicago, while those whose lines terminate at the river wish the live stock to be slaughtered there, because this will give them an opportunity to participate in hauling the products. And this conflict of interest appears to be largely responsible for the adjustment of rates complained of.

Aside from the rates in question, carriers generally make rates on live stock somewhat, and in many cases considerably, lower than on the products. This was formerly true concerning rates made by carriers operating between the Missouri River and Chicago; but soon after the large packers erected packing houses at different points on the Missouri River changes began to take place. The tonnage controlled by the packers was comparatively large, and this fact enabled them to obtain secret concessions from individual carriers. These concessions, being discovered by other interested carriers, were followed by open reductions in the published rates applied on the products. As corresponding reductions were not made in the live-stock rates the relation formerly existing between live stock and its products became changed. The rate on packing house products from Missouri River points to Chicago was finally made 5 cents per 100 pounds less than on live hogs.

* * * * * * * * * * * *

The distance from St. Paul to Chicago is about 400 miles and the average distance from the Missouri River points to Chicago is about 500 miles.

The rate from St. Paul to Chicago in each instance is about 80 per cent. of the rate to Chicago from Missouri River points, and carriers serving St. Paul endeavor to maintain this relation; but a reduction made in a rate from St. Paul might or might not be followed by a corresponding reduction from the Missouri River. * * * * The term live stock as used herein is intended to cover only cattle and hogs.

The local rate from the Missouri River to Chicago is ordinarily made the maximum on shipments to Chicago from points intermediate between Chicago and the river and is applied to all points in a territory ranging from 100 to 150 miles in width and lying immediately east of the river. The rates to Chicago from points east of said territory are somewhat less and are graded with some regard to distance. What has been said about local rates on live stock to Chicago from the river and the intermediate points applies also to the local rates on the products; and a like method obtains in making rates on live

stock and its products to Chicago from South St. Paul and points intermediate between those places.

Rates on live stock and its products to Chicago from Missouri River points and South St. Paul have ranged as follows: At the time the order referred to was complied with the rate from the river on live hogs and packing house products was made 22 cents per 100 pounds. The rate from the river on cattle was then 23½ cents, except that from Sioux City it was 25 cents; and these relations continued, with one unimportant exception, until December 1, 1894. At the latter date the rates were made the same on cattle and hogs and their products; namely, 23½ cents, except that the rate from Sioux City on cattle was not changed; and this adjustment was adhered to, except for short periods, until January 1, 1902. Between December 1, 1894, and January 1, 1902, except, possibly, for short periods, rates from South St. Paul were: On cattle 25 cents, on hogs 27, on packing house products 18½, and on fresh and dressed meats 20. On January 1, 1902, a rate of 18½ cents, called a proportional rate, was established and put in force from the river on live-stock products destined to points east of the Indiana-Illinois state line, but no other changes were made, either from the river or from South St. Paul. This adjustment continued until April 14, 1902, but meanwhile and on April 5 the complaint in this case was filed.

The first hearing was held at Chicago on May 15, 1902. At that time an officer of the Chicago, Milwaukee & St. Paul Company, speaking of his company and also for the other defendants, made a motion for an adjournment until some time in the month of July, and in support of the motion said: "It is the policy and the general practice of western roads to make their rates from the west and northwest to Chicago arbitrarily, regardless of destination. It is not obligatory. They do it when they can. Certain conditions have arisen which have made it necessary to depart in some respects from that policy, but those conditions will doubtless end with the 30th day of June next, and it is believed that thereafter the revision of the rates on live stock and live-stock products will be satisfactory to all persons interested; and for this reason we ask

for a postponement." He further stated that it was the intention of the defendants to make such adjustments as would accord with the order hereinbefore referred to. Upon this representation the hearing was adjourned until June 16, 1902, and it was afterwards postponed until the 6th day of the following November.

After the complaint was filed changes were made in the rates as follows: On April 14, 1902, a proportional rate of 18½ cents was put in force from the river on live stock either originating at points west of the river or destined to points east of the Indiana-Illinois state line, leaving the local rate to Chicago still 23½ cents. On August 8, 1902, pursuant to a contract entered into between the Chicago Great Western Company on the one hand and all packers doing business at the Missouri River points on the other, that company established and put in force from Kansas City and St. Joseph on the products of live stock a rate of 20 cents on traffic destined to Chicago and a rate of 18½ cents on traffice destined to points east of the Indiana-Illinois State line. The contract provided that these rates should remain in force seven years, in consideration whereof the packers agreed to deliver to the Chicago Great Western a certain percentage of their traffic in the products, or upon failure to do so, pay it each month, by way of liquidated damages, an agreed amount for each car short. The action of the Chicago Great Western was followed by other interested carriers and corresponding rates were put in force from other Missouri River points, while rates from South St. Paul were put in force as follows: On packing house products, 15 7/10 cents when destined to Chicago and 14 6/10 when destined to points east of Indiana-Illinois State line; and on fresh and dressed meats, 17 cents when destined to Chicago and 15 7/10 when destined to points east of the Indiana-Illinois State line. On August 11, 1902, the Atchison, Topeka & Santa Fe Company made a 12-cent rate to Chicago from Kansas City and intermediate points on live stock, and other carriers followed this action to the extent of making a 12-cent proportional rate from the river on live stock originating at points west of the river. On January 1, 1903, the Atchison Company canceled the 12-cent rate and made a rate of 18½ cents to take its place. This action was followed by

the other carriers to the extent of canceling the 12-cent proportional rate and making a proportional rate of 18½ cents to take its place. On March 1, 1903, the Atchison Company put in the place of its 18½-cent rate a rate of 20 cents and made a proportional rate from the river on live stock destined to points east of the Indiana-Illinois State line of 18½ cents; whereupon the other carriers substituted for their 18½-cent proportional rate a proportional rate of 20 cents and made another proportional rate from the river on live stock destined to points east of the Indiana-Illinois State line of 18½ cents.

Since the latter date no changes in the rates have been made. It will thus be seen that the expectations of defendants, as voiced by the officer of the Chicago, Milwaukee & St. Paul Company at the hearing on May 15, 1902, have not been realized, and the disparities in the rates are greater now than they were at that time. The Atchison Company is the only one of the defendants that is complying with the order in the Chicago Board of Trade case, hereinbefore mentioned. That company exacts from Missouri River points the same local rate and the same proportional rate on live stock that it exacts on the products of live stock, and makes the local rate, namely 20 cents, the maximum from the intermediate points. On the other hand, while the other defendants operating between the Missouri River and Chicago follow the Atchison Company rates so far as the rates on the products and the proportional rate on the live stock are concerned, they exact from the river on live stock a local rate of 23½ cents and make that rate the maximum from the intermediate points; that is to say, the local rate they exact from the river, and which is made the basis of rates from the intermediate points, is 3½ cents per 100 pounds more on live stock than on the products of live stock. And the defendants that carry live stock and its products to Chicago from South St. Paul and points intermediate between those places charge rates for the transportation that are very much higher on the former traffic than on the latter.

Since all, or nearly all, the live stock carried easterly from the Missouri River is shipped there in the first instance from other points, practically no shipments are made from the river

to Chicago upon the local rates in force between those points, and such rates are therefore important, principally, because of their effect upon rates from the intermediate points.

At the hearing on November 6, 1902, on motion of complainant, the complaint in this case, so far as it related to the Atchison, Topeka & Santa Fe Railway Company, was dismissed.

As applied to the other defendants that operate between the Missouri River and Chicago, it is substantially accurate to say that the matters advanced by them in justification of the discrimination complained of, are as follows: The Chicago Great Western contends that the discrimination is justified, first, by difference to the carriers in the cost of transportation, and second, by competition created by the packers, as hereinbefore described. The other defendants rely for their justification upon the competition created by the Chicago Great Western Company in making said contract and publishing and enforcing rates in accordance with its provisions.

Matters advanced in justification by the defendants that operate between South St. Paul and Chicago, as will be hereinafter explained, are somewhat different.

Generally speaking, the live stock is carried in cars owned by the carriers, while the products are carried in refrigerator cars owned by the packers. The refrigerator cars are nearly always returned empty to the shipping points, while 20 per cent. or more of the live-stock cars are returned loaded.

The carriers pay the packers for the use of the refrigerator cars 1 cent per mile for each mile the cars are transported, and make settlements among themselves at the rate of 6 mills per mile for the use of the live-stock cars. The former cars are much more expensive to build than the latter.

Evidence concerning weights of the cars used and the revenue-paying and other traffic carried in them was very conflicting, but we think fair averages would be about as follows:

PACKING HOUSE PRODUCTS.

Car	36,000	pounds
Revenue-paying load	28,000	"
Ice and other preservatives	3,000	"
Car, on return trip	36,000	"
Total weight carried for revenue received	103,000	"
Revenue on 28,000 pounds at 20 cents per 100	$56.00	
Less mileage from and to point of shipment	10.00	
Net revenue received	$46.00	

Revenue per 100 on total weight hauled, 4 cents and about 5 mills.

FRESH AND DRESSED MEATS.

Car	36,000	pounds
Revenue-paying load	21,000	"
Ice and other preservatives	4,000	"
Car, on return trip	36,000	"
Total weight carried for revenue received	97,000	"
Revenue on 21,000 pounds at 20 cents per 100	$42.00	
Less mileage from and to point of shipment	10.00	
Net revenue received	$32.00	

Revenue per 100 on total weight hauled, 3 cents and about 3 mills.

CATTLE.

Car	26,500	pounds
Revenue-paying load	22,000	"
Bedding, manure, etc	2,000	"
Car, on return trip	26,500	"
Total weight carried for revenue received	77,000	"
Revenue on 22,000 pounds at 20 cents per 100	$44.00	
Less mileage from and to point of shipment	6.00	
Net revenue received	$38.00	

Revenue per 100 on total weight hauled, 4 cents and a little more than 9 mills.

HOGS.

Car	26,500	pounds
Revenue-paying load	17,000	"
Bedding, manure, etc	2,000	"
Car, on return trip	26,500	"
Total weight carried for revenue received	72,000	"
Revenue on 17,000 pounds at 20 cents per 100	34.00	
Less mileage from and to point of shipment	6.00	
Net revenue received	$28.00	

Revenue per 100 on total weight hauled, 3 cents and about 9 mills.

If there should be a scarcity of cars the weights of the revenue-paying loads above stated would be somewhat increased, and we think the increases pertaining to packing house products and fresh and dressed meats would be greater than those pertaining to either cattle or hogs; but on account of the mileage received by them the packers do not, ordinarily, load very much in excess of the minimums required by the carriers, which are: On packing house products, 26,000 pounds; and on fresh and dressed meats, 20,000. The minimums pertaining to live stock vary according to the kind of live stock shipped and the length of the car used in each instance. The length of the car most generally used is 33 feet and 9 inches, and minimums pertaining to such a car are: On cattle, 22,000 pounds; and on hogs, double-deck, 22,000, and single-deck 17,000.

Further variations in the above comparisons might result from differences in incidental expenses pertaining to the different classes of traffic at terminals and while en route.

Packing house products and fresh and dressed meats are loaded and unloaded by the shippers. Live stock is nearly always loaded at the intermediate points by the shippers, without expense to the carriers, but the president of the Chicago Great Western stated that the carrier pays the stock yards company, in each instance, for loading, a fee which ranges from 25 cents to $1.50 per car. No explanation of the wide range in expense thus indicated was made, and a similar claim as regards expense was not made by any of the other defendants. The carriers pay the expense of unloading at Chicago, which is 25 cents per car, but this is included in a terminal charge of $2 per car, which is exacted on live stock, in addition to the transportation charges above specified.

Trains carrying packing house products or fresh or dressed meats are stopped at different points en route to afford an opportunity for re-icing the cars, but the re-icing is done at the expense of the shippers. On the other hand, the carriers bear the expense of spraying hogs while in transit during hot weather, and the expense of cleaning the live-stock cars, the amount of which has not been definitely shown, is also borne by the carriers.

Evidence concerning risk assumed by the carriers in transporting the different kinds of traffic was very conflicting, but the damages paid are such a small percentage of the revenue received that they are not a very important factor.

At many of their local stations the defendants furnish stock yards to accommodate shipments of live stock, but from the record it is impossible to say how much, if any, greater the expense of terminal facilities thus furnished is than the expense of terminal facilities furnished for shipments of live-stock products. In connection with some of these cattle yards defendants provide weighing facilities.

For the purpose of explaining more fully the matter of terminal expenses we quote from the testimony of an officer of the Chicago, Burlington & Quincy Company as follows: "Terminal charges on packing house product and live stock, viz., loading and unloading charges, switching charges paid other lines, etc., are difficult of comparison; they stand in different relation at different terminal points and the comparison would not be the same in the case of any two carriers because their means of access to the place of loading and unloading are seldom the same at any one point, nor is their relative situation the same at any two points. For illustration, this company reaches the Kansas City Stock Yards with its own rails and therefore does not pay any switching charge on live stock, but is obliged to pay $3 per car switching on packing house product shipped from the same point. At St. Joseph we pay a switching charge of $1 per car on live stock, while the Chicago Great Western Railway pays a total of $4 per car. We pay $1.50 per car on packing house products shipped from St. Joseph, while the Chicago Great Western Railway pays a total of $4.50 per car. At Chicago we pay a switching charge of $3.50 per car on packing house product delivered at the Union Stock Yards, which charge includes return of the empty car to our tracks. We pay from $2 to $5 per car for switching service on packing house product delivered on other lines in the City of Chicago; on live stock delivered at the Union Stock Yards we charge $2 per car in addition to the regular tariff rate and pay for trackage and unloading $1.75 per car, which does not include the

cost of our own switching service. There is no difference in the practice of the several lines who deliver live stock and packing house product at Chicago and Union Stock Yards from western points."

We understand that delivery in Chicago when that point is the final destination is nearly always at the Union Stock Yards, if the traffic is live stock; also, that a large portion of the products is delivered there. But while defendants exact a terminal charge of $2 per car for such delivery of live stock, they exact no terminal charge whatever for such delivery of live-stock products, if the traffic is shipped from a point west of Joliet, Ill. The latter point is located a short distance southwesterly of Chicago.

The freight traffic manager of the Atchison Company, testifying as to the effect of terminal and other charges paid and obsorbed by his company, said: "My view is that the rate on the product should be higher than the rate on the raw material. The rate of 12 cents per hundred pounds on live stock from the Missouri River to Chicago pays the Atchison road as much in gross for transporting a carload of live stock as the 18½-cent rate pays us for transporting a carload of fresh meat. By gross revenue I mean the charges we collect and retain after paying the terminal charges, switching charges, mileage, etc."

Defendants pass men free, who accompany and care for cattle and hogs while in transit, as follows: One man one way in charge of one car; one man each way in charge of two to five cars; two men each way in charge of six to ten cars; and three men each way in charge of eleven or more cars. Returning, these men ride on defendants' passenger trains.

Speed and tonnage of trains appear to be practically the same whether the traffic carried is live stock or the products of live stock. In each instance the tonnage offered is large and shipments are regularly and continuously made; and in these respects there is apparently no appreciable difference between the two classes of traffic.

Weights of products of cattle and hogs are percentages of weights of the live animals as follows: Hogs, meat products

about 72 per cent, total products, including offal, fertilizer, hair, etc., about 82 per cent; cattle, meat products, 45 to 60 per cent, total products about 67 per cent.

The value of the products of cattle and hogs, pound for pound, is about twice that of the live animals.

Although defendants do not exact higher rates per 100 pounds for transortation to Chicago from intermediate points between the Missouri River and Chicago than to the same destination from the river, nor claim a right to do so, some of them contend that as the bulk of the live-stock shipments are from the intermediate points while the shipments of the products are more largely from the river and the latter traffic is often carried in full train loads from the river while the former traffic, when shipped from the intermediate points, is what might be called pick-up business, the cost of transporting the live stock is greater than the cost of transporting the live stock products. This statement is true to the extent that the more switching done and the greater the number of stops made by a train the more expensive to the carrier the transportation service is, and more switching and stops are necessary when the shipments are from the intermediate points than when they are from the river. But the difference in cost thus indicated appears to be offset in the present case by the greater rate per ton per mile received by defendants on shipments from the intermediate points. As before stated, the rate is the same to Chicago from intermediate points in a territory ranging from 100 to 150 miles in width and situated just east of the river as from the river. The only one of defendants' operating officials who gave testimony on this point was the general manager of the Chicago, Burlington & Quincy Company, and he made replies as indicated below to questions concerning this matter.

Q. On the basis of the same rate on both live stock and the product, which would you consider the more remunerative traffic from a railroad standpoint, a train of fresh meat or packing house products from the Missouri River destined to Chicago, or a train of live stock picked up at main line stations east of the Missouri River?

A. That is a pretty difficult question to answer and I should think it was largely a matter of opinion, which would be arrived at by studying the ordinary conditions of handling the business. My judgment would be that the train of live stock would be the more remunerative of these two, although the difference might not be so very great. My reason for that is that while there are a good many expenses incident to the handling of live stock from local stations, the picking up of live stock on a division and gathering it into a train at a division point is not quite as expensive as hauling a train of the full size over the entire division. The cost per ton or per car is greater, but the total cost is not greater. The conditions in handling live stock, although they are pretty severe and pretty difficult to meet, have never been quite as severe or quite as difficult to meet as the conditions in hauling the dressed products.

Q. Make the same comparison between a train of live stock from the Missouri River and compared with a train of live stock picked up east of the Missouri River, at the same rate.

A. I should say that the train picked up at stations east of the Missouri River, assuming that the business was moving eastward, would be more remunerative than a solid train of the same number of cars and same weight picked up at the Missouri River terminal.

Packing house products and fresh and dressed meats include almost the entire products of live stock.

Carriers usually make lower rates on raw material than on its products, and all the railroad officials who testified in this case on that point, except the president of the Chicago Great Western Company, said that under normal conditions they believed the rates on live stock should not be higher, while some of them stated that in their opinion they should be lower, than on the products of live stock.

The president of the Chicago Great Western Company stated that his company entered into the aforesaid contract for the purpose of securing a greater proportion of the traffic

in the products of live stock than it had previously been able to obtain.

In justification of the discrimination complained of, defendants operating between South St. Paul and Chicago, in addition to matters advanced in justification by the other defendants as above specified, contend that if live-stock rates to Chicago from points in the state of Minnesota are reduced the Railroad & Warehouse Commission of that state will reduce rates on live stock from such Minnesota points to South St. Paul.

Under the laws of the State of Minnesota the Commission referred to has power, subject to revision by courts of competent jurisdiction, after complaint made and investigation duly had to substitute for rates established by common carriers doing business in that state, for the transportation of passengers or property therein, rates established by the Commission, if it determines that the rates established by the carriers are unequal or unreasonable.

The present adjustment of rates on live stock to Chicago as compared with South St. Paul, from the Minnesota points in question, was the result of conferences between said Commission and officials of the interested carriers.

After the complaint in this case was filed the Minnesota Commission notified the defendants referred to above as operating between Chicago and South St. Paul that if the rates on live stock from Minnesota points to Chicago were reduced the Commission would make corresponding reductions in the rates on live stock from such Minnesota points to South St. Paul.

Complainant introduced considerable evidence which showed that Chicago as compared with South St. Paul and the Missouri River markets has received a smaller proportion during recent years than prior thereto of the live stock raised in the territory under consideration, and claimed that this tended to show that the discrimination complained of has injured the Chicago live-stock market and those interested therein.

On the other hand, defendants showed that during recent years great improvements have been made in the facilities for handling live stock at South St. Paul and the Missouri River markets, including the erection of new packing houses and additions to old ones; that there has been a greater increase in the amount of live stock raised west of the river than east of it; and that live stock shipped from the river to Chicago shrinks in weight from 3 to 5 per cent while in transit; and claimed that these facts and others that are similar fully account for changes shown in the destination of live-stock shipments.

That the facts shown would tend to produce the effect claimed for them is evident, but in that connection it is impossible to determine to what extent each of the facts was effective.

Complainant also introduced considerable evidence tending to show that the rates exacted by defendants for transporting live stock to Chicago from points in the states of Iowa, Missouri, Wisconsin and Minnesota are unreasonable per se, but the testimony upon that point is unsatisfactory and we do not feel justified in making a finding in relation thereto.

Based upon the foregoing, we make specific findings as follows:

The discrimination against the transportation of live stock to Chicago from the shipping points in question, brought about by defendants' action in establishing and putting in force upon the products of live stock rates of transportation lower than those contemporaneously exacted by defendants for the transportation of live stock between the same points injured the live-stock market of Chicago and those interested therein, is not justified by difference to defendants in the cost of transportation, and is not otherwise justified, and therefore subjects the traffic in live stock and the Chicago live-stock market and those interested there, including complainant, to undue and unreasonable prejudice and disadvantage, and gives to the traffic in the products of live stock and shippers and localities interested in such traffic undue and unreasonable preference and advantage.

And under the head of Conclusions, the Commission further found:

"Packing house products and fresh and dressed meats include almost the entire products of live stock, and although at the same rate per 100 pounds the traffic in packing house products pays, above cost of transportation, a greater revenue than the traffic in either fresh or dressed meats, defendants make no difference in their rates on that account. They also charge the same rates for transporting cattle that they exact for transporting hogs.

If cattle and hogs are considered together on the one hand and packing house products and fresh and dressed meats on the other it will be seen that after deducting mileage according to payments made by defendants the revenue received by them compared with the paying and non-paying tonnage hauled is greater at the same rate on live stock than on the products of live stock. But expenses incidental to the transportation do not apply equally to the different classes of traffic.

Although the products of live stock are shipped to some extent from packing houses located at some of the intermediate points and the local rate from the river is made the maximum for such shipments, generally speaking, the local rates in question apply to live stock shipped from the intermediate points and products of live stock shipped from Missouri River points and South St. Paul, because the bulk of the live-stock shipments in question is from the intermediate points while shipments of the products are largely from the river and South St. Paul.

At intermediate stations where the tonnage of live stock shipped is considerable defendants provide, for the accommodation of this traffic, cattle yards, and, in many instances, weighing facilities. This is an expense that does not apply to shipments of the products; but, on the other hand, the switching and terminal charges paid on the products at Missouri River points and absorbed by defendants, although not definitely shown, are large, and fully sufficient, we think, to

offset terminal expenses on live stock at the intermediate shipping points.

Apparently, the switching and terminal charges paid by defendants at Chicago, when that point is the final destination, are the same whether the traffic is live stock or the products of live stock, except that defendants pay 25 cents per car for unloading the live stock and also pay for cleaning the live-stock cars, and we understand that nearly all the former traffic and a large portion of the latter is delivered at the Union Stock Yards; but while defendants exact a terminal charge of $2 per car for such delivery of live stock they make no terminal charge whatever for such delivery of live-stock products when the shipments are from points west of Joliet, Ill. The latter point is located a short distance south-westerly of Chicago.

Another expense incidental to the transportation of live stock that does not apply to the products is that connected with the transportation of men who accompany the live-stock shipments. Such transportation subjects defendants to some additional risk, but we think the risk is about the only expense connected with the transportation of the men that should be considered in connection with the transportation of the live stock. These men take care of the stock while in transit and thus relieve defendants of duties they would otherwise have to perform, and the carriage of the men free is incidental to, and cannot be considered separately from, the transportation of live stock. But whatever the expense to defendants thus caused may be, we are convinced that it is offset, and more than offset, by the fact that 20 per cent or more of the live-stock cars are returned to the shipping points loaded, while refrigerator cars are nearly always returned empty.

There are a few other differences in cost of transportation, but they are not very important and have been fully explained in the findings of fact; we do not deem it necessary, therefore, to notice them here in detail.

After a careful consideration of all matters disclosed by the record we conclude that the discrimination complained of

is not justified by difference to defendants in the cost of transportation.

* * * * * * * * * * * *

The competition between live stock and the products of live stock is very severe both in the markets of purchase and in the markets of sale, and live stock raised in the vicinity of the Missouri River is now and for many years has been transported to and slaughtered at different points in territory lying between that river and the Atlantic Seaboard. Packing houses at these different points have been established and maintained under rates of transportation which, generally speaking, have not been higher, while in many instances they have been lower, on the live stock than on the products; and the principle governing this adjustment, namely, that the rates on raw material shall not be greater than on the products of the material, has been applied in nearly all other cases of a similar nature. It is therefore apparent that if the matters of defense advanced in this case are held to justify the discrimination complained of many other discriminations of a like nature may result.

But some of the defendants contend that it is natural and therefore proper for live stock to be slaughtered at or near the points where it is raised. They say that if this is done shrinkages in weights and other waste that would otherwise result will be avoided.

The record shows that live stock shrinks some in weight while in transit, and this is naturally an advantage to the near-by market and one to which it is entitled, but such natural advantage does not justify a discrimination in rates in favor of the near-by market which would otherwise be unlawful. The record also shows that it is practicable to transport live stock long distances and that this has been done continuously for years for the purpose of increasing its business, but that right is qualified by the prohibition that that company shall not unduly discriminate against another kind of traffic; and when that company established and put in force from Kansas City and St. Joseph to Chicago rates on the products of live stock that were lower than rates it was then exacting between the same points on live stock it unduly discriminated against the

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latter traffic. This conclusion is based upon all the circumstances and conditions surrounding the transportation of and the relation existing between these two classes of traffic, which have been fully explained above and need not be repeated here. As it appears to us, a contrary holding would be equivalent to saying that a quasi-public servant may use its franchise for the purpose of building up some markets and destroying others, if in its judgment its stockholders will be benefited by such action. The large interests affected, the immense amount of money invested, the many live-stock markets and packing centers that have been built up and maintained under the former relation of rates, and the injury that will result if the change in that relation is permitted to continue, amply warrant the conclusion that the discrimination in question is not justified by the desire of the Chicago Great Western Company to benefit its stockholders by increasing its business.

Having held that the action of the Chicago Great Western Company in reducing the rate on the products from Kansas City and St. Joseph without making corresponding reductions in the live-stock rate was unlawful, the like ruling must be made as to the other defendants who have followed that company in making the disparity complained of effective. The rate on the products was reduced from the other Missouri River points and South St. Paul because it had been reduced from Kansas City and St. Joseph and reduced from the intermediate points because it had been reduced from the river, and all the defendants have been and are practicing at these various points an unlawful discrimination against live-stock traffic. Therefore, whether the unlawful practice was begun by one or by another is not a matter of great importance. It is apparent that should we issue an order only against the Chicago Great Western requiring it to restore the former relation of rates and the order should be complied with, the principal ground of justification now advanced by the other defendants would be removed; and unless such action of the Chicago Great Western were followed by the other defendants it would become necessary to issue another order against the latter. Moreover, higher rates on live stock were being charged by a

number of the other defendants as well as the Chicago Great Western before the Chicago Great Western contract was made and at the time the complaint was filed.

The defendants operating between South St. Paul and Chicago contend that if rates on live stock from points in Minnesota intermediate between South St. Paul and Chicago are reduced to Chicago the Minnesota Commission will make corresponding reductions from such Minnesota points to South St. Paul. This contention was supported by testimony of a member of that commission, who stated that, in his opinion, the present adjustment of live-stock rates, as between South St. Paul and Chicago, is fair, and that, therefore, any reduction to Chicago, unless followed by a corresponding reduction to South St. Paul, would make the relation unequal. If such relation is now just (concerning which we express no opinion) and in complying with any order that may be made in this case these defendants reduce the rates to Chicago, corresponding reductions to South St. Paul should of course be made. This also applies to similar contentions of the interveners representing interests at points on the Missouri River."

The Court in its opinion (Record, p. 176) made certain findings of fact upon which the decree was based, as follows:

FINDINGS OF FACT.

First. That the live stock rates are reasonable in themselves. All live stock from points west, southwest and northwest of the Missouri River and St. Paul are shipped on a proportional rate from the Missouri River or St. Paul to Chicago. These rates are equal to or less than the rates on dressed meats and packing house products between the same points. There can be, and is, no complaint as to such traffic. The local rates from the Missouri River and St. Paul, and from 150 miles east, to Chicago, are as shown in above schedule. These rates gradually decrease until the Mississippi River is reached, and the average Iowa rate

is twenty-one cents. The great weight of evidence indicates that these rates are at least reasonably low.

Second. That the cost of carryng live stock is greater than that of carrying dressed meats and packing house products.

Third. That the value of the service of carriage is greater to the packers because of the higher price of a car of dressed meats or packing house products. Dressed meats and packing house products are in value worth nearly twice as much as live stock. This factor is important, in ordinary cases, however, in part, because of the greater risk of carriage, of high priced commodities. In these cases as to the particular commodities in question, the evidence shows that the defendant railroad companies pay out a much larger amount in damages arising from the carriage of live stock than they do for losses arising from the carriage of dressed meats and packing house products, in proportion to the value of the products carried, and more in damages per car regardless of the value. This makes the risk for carriage greater for live stock. The result is that the value of the service is not such an important factor in this kind of a case as it is considered to be in ordinary cases.

Fourth. That the rates in question given to the packers at Missouri River and St. Paul, were the result of competition. The product of the packers at these points was large in quantity, was certain and continuous in amount, was in the hands of a few people, and for years before the Federal injunction of March, 1902, had been competed for so strenuously by the railroads reaching and passing through these points, as to cause the cutting of rates and the giving of secret rebates in large amounts. Four of the defendant companies, the Chicago, Milwaukee & St. Paul Railroad Company, the Chicago & Northwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Burlington & Quincy Railroad Company, passed through these points into the territory west of the Missouri River and St. Paul. Four other of the defendant companies, the Chicago, Great Western Railway Company, the Chicago & Alton Railway Company, and the Wabash Railroad Company reached the Missouri River points and St. Paul, competing for this business. Other railroads, running south to the Gulf of Mexico, also competed more

or less for said business, including the Atchison, Topeka & Santa Fe Railway.

After said injunction was granted the defendant railroads obeyed it, and until August of that year, the said traffic was carried under competition between the defendant at the rate of twenty-three and one-half cents from Missouri River points to Chicago, and twenty-five cents from St. Paul to Chicago, etc., as set out above. As a result of such competition, the Chicago Great Western Railway Company became dissatisfied with the proportion of the business it received, and in order to get what it claimed as its share, cut the rate of twenty cents to Chicago and eighteen and one-half cents to the Indiana line for eastern business, and published the same. This it did under a contract with the packers running for seven years. The Chicago Great Western Railway Company was the longest route from Chicago to the Missouri River points. The other defendant railroads to meet the rate made by the Chicago Great Western Railway Company, as a result of competition, met and published the same rate. These rates were not made voluntarily, but from necessity arising from competition. The necessity being that of carrying the goods at the lower rate or losing the business to which the officers of said companies thought they were entitled. This cutting of the rate by the Chicago Great Western Railway Company was not the origin of competition; that had existed legally since March, 1902, between defendant railroads, and also between them and the Atchison, Topeka & Santa Fe Railway Company.

There was not competition enough at said points to lower the rate as to live stock. There was little and different competition between the Missouri River and St. Paul and Chicago. The only places where the opportunities for competition existed as to live stock the same as to packing house products, were immediately at Missouri River points and St. Paul, and there only as to live stock driven in on foot from the surrounding country. There is comparatively a small amount of this stock. If it was exactly the same kind of a commodity as that furnished by the packers there would be an opportunity for competition in this at these points alone.

Fifth. That the competition in question did not result from agreement of the defendants, but was actual genuine competition.

Sixth. That the present rates have not materially affected any of the markets, prices or shipments; that they are reasonably fair to Chicago, and to the shippers; that the shipments of live stock from points between Chicago and the Missouri River and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of the live stock comes to Chicago from points as near as 150 miles this side of the Missouri River and St. Paul, and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock.

Seventh. That the rates for carrying packers' products and dressed meats were remunerative. They did not pay any portion of the fixed charges and interest of the railroad companies, nor its full share of the operating expenses, but they did pay more than its cost of movement and leave something to apply upon operative expenses.

Eighth. That the welfare of the public, including the shippers, consumers and all localities and markets, does not seem to be materially affected by the present rates.

Ninth. That the usual custom is for railroads to charge a higher rate for the finished product than for the raw material, and this, as a rule, has been applied to live stock and its finished products. This is not universal, however. There are many commodities where the raw material is charged more for carriage than its finished product, as in the case of the raw material of cotton and the compressed cotton, straw, unbaled and baled, pig iron and its products and many other commodities.

It also appears that for sixteen years out of twenty-three, between Missouri River points and St. Paul and Chicago, the published rates on live stock were higher than on dressed meats and packing house products. Many witnesses testified that the ideal rate for the finished product would be higher than the raw material. This, however, was based on the presumption that competition or commercial necessity did not interfere, and that the cost of service and value of the products would be greater in case of the finished products than in that of the raw material.

On the 15th day of January, 1906, appellant filed its petition for appeal to this Court which is here presented, and on the same day filed its assignments of error, complaining that the Court erred in the particulars pointed out, as follows: (R., pp. 181 to 186.)

III.

ASSIGNMENTS OF ERROR.

1. Said Court erred in decreeing that the bill or petition of the Interstate Commerce Commission be dismissed.

2. Said Court erred in not granting the relief prayed for in the said bill or petition of the Interstate Commerce Commission.

3. Said Court erred in not rendering a decree for the enforcement of the order of said Commission.

4. Said Court erred in holding that the rates on live stock involved in said causes are reasonable in themselves.

5. Said Court erred in holding that the rates on the products of live stock involved in these causes were remunerative prior to their reduction.

6. Said Court erred in holding in effect that said rates on the products of live stock as reduced are remunerative and lawful rates.

7. Said Court erred in holding that the cost of carrying live stock is greater than that for carrying dressed meats and packing house products.

8. Said Court erred in holding that the rates in question given to the packers at the Missouri River and St. Paul on their products were the result of competition.

9. Said Court erred in holding that the alleged competition set up in these causes justified the reduction of the rates on the products below those on the live stock.

10. Said Court erred in holding that the alleged competition set up in these causes was bona fide and such as in contemplation of law can justify preferences or prejudices otherwise undue.

11. Said Court erred in holding that the competition alleged in these causes can be set up as a defense under Section 3 of the Act to regulate commerce.

12. Said Court erred in holding that the lower rates on the products of live stock than on the live stock has worked no injury to the shipper of the latter.

13. Said Court erred in holding that the present rates complained of in these causes are "reasonably fair to Chicago and to the shippers of live stock."

14. Said Court erred in holding that the rate of twenty cents per one hundred pounds charged for transportation by defendants of dressed meats and packing house products from Kansas City, St. Paul, South Omaha, Sioux City and other Missouri River points involved to Chicago, while the rate of twenty-three and one-half cents was, and is charged on cattle, hogs and sheep from the said Missouri River points to Chicago, did not, and does not, constitute an undue and unreasonable preference and advantage in favor of dressed meat and packing house products and the shippers of the same, and that said rate adjustment did not, and does not, subject such live stock, and the shippers thereof and the live stock market at Chicago to an undue and unreasonable prejudice and disadvantage in violation of Section 3 of the Act to Regulate Commerce.

15. Said Court erred in holding that the prima facie case made by the findings of the Commission had been overcome by the evidence offered before the Court, and in effect overruling the following ultimate findings of fact made by the Commission as follows:

> "Based upon the foregoing, we make specific findings as follows:
>
> "The discrimination against the transportation of live stock to Chicago from the shipping points in question, brought about by defendants' action in establishing and putting in force upon the products of live stock rates of transportation lower than those contemporaneously exacted by defendants for the transportation of live stock between the same points injured the live stock market of Chicago and those interested therein, is not justified by difference to defendants in the cost of transportation, and is not otherwise justified, and therefore subjects the

traffic in live stock and the Chicago live stock market and those interested therein, including complainant to undue and unreasonable prejudice and disadvantage and gives to the traffic in the products of live stock and shippers and localities interested in such traffic undue and unreasonable preference and advantage."

16. The Court erred in holding that the rate of twenty-five cents per one hundred pounds on hogs from South St. Paul and St. Paul to Chicago was just and reasonable.

17. The said Court erred in holding that the rate of fifteen and seven-tenths cents per one hundred pounds on packing house products and seventeen cents on dressed meat from St. Paul to Chicago, while the rate on cattle was twenty-five cents and on hogs twenty-seven cents did not constitute an undue and unreasonable preference and advantage to dressed meat and packing house products and the shippers thereof, and did not subject cattle and hogs and the shippers thereof to an undue and unreasonable preference and disadvantage.

18. The said Court erred in holding that the lower rate from Omaha, Des Moines, Marshalltown and Cedar Rapids, Iowa, to Chicago, on dressed meat and packing house products, than is the rate on cattle and hogs from the said points to Chicago, did not constitute an undue and unreasonable preference and advantage to the dressed meat and packing house products, and the shippers thereof, and did not subject cattle and hogs, and the shippers thereof, to an undue and unreasonable prejudice and disadvantage.

19. The said Court erred in holding that the lower rates on packing house products and dressed meat from the Missouri River points in question, and from interior points in Iowa, than is charged on live stock shipped locally from the said points to Chicago, did not create in favor of dressed meats and packing house products and the shippers thereof an undue and unreasonable preference and advantage, and did not subject the live stock market at Chicago and those interested including complainant, to an undue and unreasonable preference and disadvantage.

20. The Court erred in finding that:

"All the witnesses agreed in the showing that the cost of service in proportion to the value of both kinds of commodities was greater in carrying live stock."

21. The Court erred in finding that it was:

"Substantially agreed by the witnesses that the risk of carriage, notwithstanding the double value of fresh meats, was not as great in carrying fresh meats, and packing house products as in carrying live stock."

22. The Court erred in finding that the witnesses:

"All agreed that competition was the greatest factor in determining a rate."

23. The Court erred in finding that:

"The average Iowa rate to Chicago was twenty-one cents."

24. The Court erred in finding that the Chicago market is not injured by the present rate and basing that upon the finding that:

"The evidence tends to show that a majority of the cattle within 150 miles from the Missouri River and St. Paul went to Chicago rather than to the Missouri River and southeast from St. Paul upon the present rates."

25. The said Court erred in finding that the Chicago market fluctuated from five cents to fifty or seventy-five cents in a day.

26. The said Court erred in finding that:

"The evidence shows that the defendant railroad companies pay out a much larger amount in damages for losses arising from the carriage of live stock than they do for losses arising from the carriage of dressed meats and packing house products, in proportion to the value of the product carried and more in damages per car regardless of the value."

27. The said Court erred in its holding based on the quotation next above that:

"The result is that the value of the service is not such an important factor in this kind of a case as it is considered to be in ordinary cases."

28. The said Court erred in finding that:

"Other railroads running south to the Gulf of Mexico also competed more or less for said business."

That is the business for transporting packing house products and dressed meats, and in taking that in consideration.

29. The said Court erred in finding that the Chicago Great Western Railway Company was the longest route from Chicago to the Missouri River points, and in holding that:

"The rates were not made voluntary, but from necessity arising from competition, the necessity being that of carrying the goods at the lower rate or losing the business to which the officers of said companies thought they were entitled. This cutting of the rate by the Chicago Great Western Railway Company was not the origin of competition."

and in basing its decision thereon.

30. The said Court erred in holding in effect that because the railway companies did not make a lower rate on live stock because they did not see fit to do so as a result of competition between themselves, justified the roads in making a lower rate on packing house products and dressed meats without violating the third section of the Act to regulate commerce, prohibiting undue preference as between the two classes of commodities.

31. The Court erred in finding that:

"The only places where the opportunities for competition existed as to live stock the same as to packing house products were immediately at the Missouri River points and St. Paul."

32. The said Court erred in finding that:

"The present rates have not materially affected any of the markets, prices or shipments; that they are reasonably fair to Chicago and to the shippers; that the shipments of live stock from points between Chicago and the

Missouri River and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of the live stock comes to Chicago from points as near as 150 miles this side of the Missouri River and St. Paul and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock."

33. The Court erred in finding that:

"That the welfare of the public, including the shippers, consumers and all localities and markets does not seem to be materially affected by the present rates."

34. The said Court erred in finding that, the law is intended only

"To prohibit unjust discriminations in the rendition of like service under similar circumstances and conditions."

35. The said Court erred in finding that:

"Any fact which produces an inequality of condition and a change of circumstances justifies an equality of charge."

And in applying that mistaken principle in the decision of this case.

36. The Court erred in finding that:

"The cost of service to the carrier would be an ideal theory, but is not practical,"

And in giving effect in its decision to its findings of fact that the cost of the carriage is greater in case of live stock than in dressed meats and packing house products.

37. The Court erred in finding that:

"The amount of the product or the commodity in the hands of a few persons to ship or compete for, entitles such shippers to the lower rate of freight than one having a less quantity."

And in applying that principle to thise case where the rates are based upon the unit of a car load.

38. The said Court erred in finding that:

> "In every case the Supreme Court has held that competition may be controlling."

And that such competition applies to Section 3 of the Act to Regulate Commerce with respect to preferences and discriminations as between different descriptions of traffic and the shippers thereof.

39. The said Court erred in its construction of the decision of the Interstate Commerce Commission in holding that:

> "The Interstate Commerce Commission, in its opinion, considered the facts as to competition and found they did not control the fixing of rates. Its opinion and the concurring opinion of Commissioner Knapp, show, however, that the majority of the Commission acting in this case (Fifer and Prouty) thought that it was not a case to which competition applied."

40. The said Court erred in finding that the same principle must apply in determining the question of undue and unreasonable preference as between different descriptions of traffic as apply to undue and unreasonable preference as between different places when it is charged that the fourth section of the Act to Regulate Commerce is violated.

41. The said Court erred in holding that the Chicago Great Western Railway Company did not begin the competition and that it was immaterial if it did, and in holding that it was the duty of the officers of that railroad company to get business in the interest of the stockholders to accomplish which that it had the right to reduce the rates on dressed meats and packing house products by the contract which it made with the Missouri River packers without being subject to the requirements of Section 3 of the Act to Regulate Commerce, prohibiting undue preference to any particular description of traffic or shippers thereof.

42. The said Court erred in holding that the evidence shows that "this carrier" (C. G. W. Ry. Co.) must reduce the rate or lose the business.

43. The said Court erred in holding that competition was:

"Limited to the live stock driven into the Missouri River points and St. Paul in determining whether that commodity is therein entitled to the same rate as packer's product shipped from those same points."

44. The said Court erred in holding that the evidence shows that in substantially all cases the factor of competition alone controls the rate, and in holding that the Supreme Court has held that competition may be controlling, and upon that mistaken theory in finding that:

"Upon a consideration of all the evidence the Court holds that the prima facie case made by the findings of the Commission has been overcome by the evidence offered before the Court."

Appellant here complains that the decree of the Circuit Court dismissing complainant's bill for enforcement of the said order of the Interstate Commerce Commission was erroneous for the reasons and in the particulars specified in the foregoing assignments of error, which appellant here urges, for which errors appellant now prays this Court to reverse said decree and to direct said Circuit Court to make a proper decree in the premises to the end that the defendants in said cause may be compelled to comply with said order.

IV.

BRIEF OF ARGUMENT.

EFFECT TO BE GIVEN THE COMMISSION'S DECISION.

The Act to Regulate Commerce is a remedial act, and it was intended that the Interstate Commerce Commission established by that act should in the first instance decide in accordance with the provisions of the act, alleged violations thereof, and that its decision with respect thereto should be regarded as correct, except on clear and satisfactory showing to the contrary.

The Supreme Court of the United States in the case of Smyth vs. Ames, 169 U. S., 466, said:

> "Undoubtedly that question (reasonableness of rates) could be more easily determined by a commission composed of persons whose special skill, observation and experience qualify them to handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people."

It is provided in the 12th section of the act:

> "That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from said common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act."

In addition to the foregoing requirements, elaborate provision is made for securing the attendance of witnesses and pro-

duction of books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation.

Section 13 provides that all manner of associations and societies, bodies, politic and municipal, shall have the right to complain before the Commission, of violations of the act, and provide that if "there shall appear to be any reasonable ground for investigating said complaint it shall be the duty of the Commission to investigate the matters complained of;" and further, that "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

It was then provided by Section 14:

> "That whenever an investigation shall be made by said Commission it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon whch the conclusions of the Commission are based * * * and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found.
>
> "All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained and to the common carrier that may have been complained of.
>
> "The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all Courts of the United States and of the several States without any further proof of authentication."

It was provided by the 15th section that "if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission either by the testimony of witnesses or other evidence, that anything has been done in violation of the provisions of this act, or any law cognizable by said Commission, by any common carrier * * * it shall be the duty of the Commission to forthwith cause a copy

of its report in respect thereto to be furnished to such common carrier, together with a notice to said common carrier to cease and desist from such violation," etc.

By the 16th section of the act provision was made that in case of disobedience of the order of the Commission it should have the right to apply in a summary way by petition to the Circuit Court of the United States sitting in equity, alleging such violation and disobedience, whereupon "said Court shall proceed to hear and determine the matter speedily as a Court of Equity without formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it thinks fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the Court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be prime facie evidence of the matters therein stated; and if it be made to appear to such Court, on such hearing, or on report of any such person or persons, that the order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such Court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commission, and enjoining obedience to the same," etc.

By the 17th section, among other things the Commission was authorized to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

By the 19th section, among other things it is provided that "it may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties in any part of the United States into any matter or question of fact pertaining to the business of any common carrer, subject to the provisions of this act."

The 20th section authorized the Commission to require from any carrier subject to the provisions of the act, the most elaborate statistics relative to every branch of its business.

It cannot be questioned that these provisions manifest the intention that the Commission should secure the very widest possible personal, individual and official knowledge pertaining to every matter of fact which would enable it to determine whether the carrier in a given case had volated any of the prohibitory provisions of the act.

The law provides a special tribunal before whom persons claiming a violation of the act by any common carrier may present their petition for trial, with the obvious assurance that the decsions of the Commission will not be set aside except when clearly and manifestly erroneous.

Therefore, when considering whether the injunction as prayed for in this case to enforce the order of the Commission should be granted, it was the duty of the Court to give great weight to the decision of the Commission, and to enforce its order unless shown clearly to have been unlawful.

There is no contention that the Commission did not proceed in accordance with the provisions of the act, or that it excluded any evidence or refused to consider any matter proper to be considered.

But the whole contention, as evidenced by the opinion of the Circuit Court, may be summed up in the proposition that the conclusion of fact of the Commission to the effect that the difference in the rates on live stock and the products of live stock in question constitutes an undue preference to the shippers of the products of live stock and to the markets and localities enjoying those rates, and an unreasonable prejudice and disadvantage to the shippers of the live stock and the localities of Chicago as the point of destination in violation of Sections 2 and 3 of said Act, is not justified by the facts. There is no contention that the decision of the Commission was not justified by the facts presented to it; nor is there any contention that the circumstances and conditions which existed surrounding the traffic had so changed that if when the decision of the Commission was rendered there was an undue and unreasonable preference and discrimination, it did not still exist at the trial before the Court.

What the defendants sought to do in this case was to prove, independently of the decisions of the Commission and independ-

ently of the evidence before it, that such discrimination as existed was not an undue or unreasonable one. That is, they sought to prove that the Commission's conclusion was not correct, in holding the preference undue or unreasonable, or the disadvantage or prejudice unjust.

In addition to this, the contention was made that as a matter of law, if the live stock rate is a reasonable one, then the lower rate on the products of live stock could not constitute an unlawful discrimination where one of the carriers contracts to carry at such lower rate, and the others in order to meet the competition thereby created in order to themselves participate in the business, publish the same rates as are thus contracted for; that is to say, as a matter of law under such circumstances the Commission would have no right to hold that the preference or discrimination was undue or unreasonable, because the result of competition not applicable to live stock. The Circuit Court took this view and apparently on that sole ground held that the preference and discrimination was not undue, unjust or unreasonable.

The Court erred, therefore, in its decree dismissing the complainant's bill and refusing to enforce the order of the Commission in the foregoing third assignment of error, and in the particulars specified in the foregoing assignment of error No. 15, wherein the appellant complained that the Court erred in overruling the ultimate findings of fact by the Commission and that the relations of rates in question constituted a violation of the third section of the Act to Regulate Commerce.

V.

ANALYSIS OF THE POINTS TO WHICH THE EVIDENCE RELATED.

A.

COMPARATIVE RATES ON LIVE STOCK AND ITS PRODUCTS.

(1) Previous published rates on meat and product from Missouri River to Chicago. (Rec., p. 1645.)

(2) Previous published rates on meats and products from St. Paul to Chicago, Commission's findings ante.

(3) Previous published rates on meat and product from interior points to Chicago. (Rec., pp. 1599 to 1608.)

(4) Previous published rates on live stock from St. Paul to Chicago. (Rec., p. 1607.)

(5) Live stock rates from west of Missouri River and proportionals to Chicago. (Rec., pp. 1572-3.)

(6) Live stock rates from interior Iowa to Chicago. (Rec., pp. 1605 to 1608.)

(7) Balances or proportional rates live stock rates from Missouri River to Chicago. (Rec., pp. 1572-3.)

(8) Iowa distance tariffs on live stock. (Rec., p. 1687.)

(9) Illinois distance tariffs on live stock. (Rec., p. 1687.)

(10) Minnesota schedules on live stock. (Rec., pp. 1938-9.)

(11) Central Traffic Association tariffs. (Rec., p. 1686.)

(12) Rates via Mississippi River to Chicago eastern points on meat and product. (Rec., p. 1586.)

(13) Rates from Chicago to eastern points on meat and product. (Rec., p. 1389.)

(14) Present rates in question to Chicago on meat and product. (See attached table.)

(15) History of rates in question to Chicago on meat and product. (Rec., p. 1645 and Commission's findings.)

(16) Rebates from rates in question to Chicago on meat and product.

(17) History of live stock rates in question. (Rec., p. 1647, also Commission's findings.)

There is no dispute as to the foregoing points, and the Commission's decision as to the same, which covers all the essential points, is not questioned, except that the Circuit Court finds that the rates

> "That for sixteen years out of twenty-three, between Missouri River points and St. Paul and Chicago, the published rates on live stock were higher than on dressed meats and packing house products."

The finding was based on a history of the rates published by the Commission. (Rec., pp. 1644 and 1645.) That is not

contrary to the Commission's findings, because it referred to the published rates which for years were not maintained, while the Commission was speaking of actual rates from Missouri River on both live stock and the product, not published tariffs. The Commission found:

> "Aside from the rates in question, carriers generally make rates on live stock somewhat, and in many cases considerably lower than on the products. This was formerly true concerning rates made by carriers operating between Missouri River and Chicago; but soon after the large packers erected packing houses at different points on the Missouri River changes began to take place. The tonnage controlled by the packers was comparatively large, and this fact enabled them to obtain secret concessions from individual carriers."

The date when concessions began and period covered is not stated. The Commission also found that the published rates on live stock were important because they were the basis of rates in a zone east of Missouri River. It is shown in the evidence that live stock is not in fact shipped on the published rate locally from Missouri River but it moves on the balance of the rate, generally about 16 cents per 100 lbs., which is lower than the dressed meat and packing house product rates. Any seeming conflict between the Court's findings and those of the Commission as to the history of these rates actually paid, is thus explained so that there is in reality no conflict. We deem it necessary to review the item of evidence under this head because there is no controversy concerning the same. The rates in question are set out in the accompanying table. Comparative rates are set out in various exhibits cited as well as the changes in the rates, and will be referred to in argument when important.

STATEMENT SHOWING RATES ON CATTLE, HOGS, PACKING HOUSE PRODUCTS AND FRESH MEATS, CAR LOADS, FROM MISSOURI RIVER AND OTHER POINTS TO CHICAGO, ILL.

(RATES IN CENTS PER HUNDRED POUNDS.)

To Chicago, Ill. from	Cattle.	Hogs.	Packing House Products.	Fresh Meats.
Kansas City, Mo.	23.5	23.5	20	20
St. Joseph, Mo.	b20	b20		
Atchison, Kans.	c18.5	c18.5	a18.5	a18.5
Leavenworth, Kans				
Council Bluffs, Ia.	23.5	23.5	20	20
Omaha, Neb.			a18.5	a18.5
Nebraska City, Neb				
Sioux City, Ia.	25	23.5	20	20
			a18.5	a18.5
St. Paul, Minn.	25	27	15.7	17
So. St. Paul, Minn.		b17.5	a14.6	a15.7
Ottumwa, Ia.	22	21	16	
Des Moines, Ia.	22	23.5	18.5	
Marshalltown, Ia.	22	21	16	
Cedar Rapids, Ia.	21	18.5	13.5	

(a) Destined to points east of Illinois-Indiana State line.

(b) Applies on shipments originating beyond.

(c) When originating beyond and destined beyond the Illinois-Indiana State line.

B.

The greater part of the eveidence produced by defendants was directed to this subject in one or more of the particulars, hereinafter specified, with the object of showing that the profits of defendants' business of transporting the fresh meat and packing house products for the packers at Missouri River and South St. Paul, and at interior points, to Chicago, as compared with the profits in transporting cattle and hogs from Missouri River and St. Paul and from points intermediate to Chicago, does justify the unlawful discriminations and preferences found by the Commission; and that it erroneously held that said discriminations were not justified by the difference in the cost of the service, or otherwise justified.

RELATIVE COST OF THE SERVICE.

(1) Car loading in tonnage on each sort of freight.

(2) Train loading in tonnage and relative amounts of freight and gross weight.

(3) Weight of stock car without load.

(4) Weight of bedding in loaded cars of live stock.

(5) Cost of cleaning after shipments of live stock.

(6) Returning loading for live stock cars.

(7) Speed of trains carrying the different classes of freight.

(8) Weight of refrigerator car without load.

(9) Weight of ice and salt and preservatives when loaded.

(10) Return loading for refrigerator, or rather no return loading.

(11) Speed of returning cars, both as to refrigerator and stock cars.

(12) Car mileage cost for use of refrigerators, 1 cent, stock cars 6 mills.

(13) Terminal expenses and charges at originating and delivering points.

(14) Loss and damage claims for injury to live stock and meats.

(15) Stock yards expenses at the point of receiving.

(16) Return transportation of attendants going with live stock.

(17) Relative distance of haul of live stock and products, in question.

(18) Relative cost of maintenance of cars for both live stock and its product.

The evidence is conflicting as to each of the above items in paragraph B. Both the Court and Commission held, however, that the cost of the service was not material, and the Court did not find what the items of cost or the profits were, though it found that it cost more per cent to handle the live stock than the meat and other products.

But the Commission found the facts as to average of earnings and cost as hereinbefore shown in its findings, (ante p. ——), and certain of the above items, viz.: (1), (3), (4), (6), (8), (9), (10), (12), (13), (14), (15) and (17), which the Court did not question, as it made no finding as to either. We shall attempt to show under this head later on, that the relative cost of service or profits does not justify the discrimination, in order to show that the decree cannot be sustained on that ground, although the Court did not hold to the contrary; and we shall likewise attempt to show that the Court was not justified in concluding that the cost of the carriage of the live stock is greater than the product thereof, per car.

C.

EVIDENCE OF ABOVE ITEMS OF RELATIVE COST OF SERVICE REVIEWED.

The Commission held that the discriminations found to exist were not justified by the difference in the cost of transportation, (Ante, p. 24), but in its conclusion after reviewing the items of the difference in cost of transportation, the Commission said:

> "After a careful consideration of all matters disclosed by the record we conclude that the discrimination complained of is not justified by difference to defendants in the cost of transportation. And this was the view expressed by some of defendants' officials. The freight traffic manager of the Atchison Company, as hereinbefore stated, testified that from the Missouri River to Chicago a 12-cent rate on live stock is as profitable as a rate of 18½ cents on fresh meat. But this might be true when applied to transportation by the Atchison Company, although not true when applied to transportation by some of the other defendants. What are called 'out of pocket' expenses, which are paid by the defendants and because of which no charges in addition to the regular rates of transportation are exacted from shippers, vary according to the variations in location of defendants' respective lines of railway.

"In making calculations concerning cost of transportation we have endeavored to describe the general situation and have not attempted to give in detail the differences that exist between the different lines operating in the territory under consideration; first, because it would be impossible to state such differences accurately, and, second, because although we think cost of transportation is a very important element we do not consider it a controlling element in this case."

The Commission found (Ante, p. 15), that for hauling these different commodities from Missouri River to Chicago and returning the empty car, the carriers receive after paying car mileage net returns per 100 pounds gross weight both ways the following:

Packing house products	4.5c
Fresh and dressed meats	3.3c
Cattle	4.9c
Hogs	3.9c

The Commission was here speaking of profits and not cost.

The Court did not find to the contrary. Its finding was that it cost more to haul the live stock than its product per car. It does not appear that the Court considered the return haul or expense of car mileage so as to find the net revenue. As we shall show, the Court was in error, if it meant that considering these items it cost more to haul live stock.

It is the contention of the appellants' counsel that the Commission correctly concluded that the cost of service was not a controlling element, and that the Court was correct in concurring in that conclusion. But it is a material element for consideration, and was the point to which most of the evidence related.

We, therefore, submit that the Court erred as specified in the 7th assignment of error wherein the appellant complains that the Court erred in holding that the cost of carrying live stock is greater than that of carrying dressed meats and packing house products; and that said Court erred as specified in the 20th assign-

ment of error in finding as a fact that all the witnesses agreed in the showing that the cost of service in proportion to the value of both kinds of commodities was greater in carrying live stock.

Under these errors we submit the proposition that:

The profits of transporting cattle and hogs from Missouri River and points interermediate and from St. Paul to Chicago, are as great as the profits in transporting dressed meats and packing house products from Missouri River and from St. Paul to Chicago.

The gross earnings in each case must be obtained by multiplying the weight by the rate, hence the average car loading is an essential factor.

The relative cost of performing the service and the profits to be obtained are dependent upon the items named in the analysis of the points to which the evidence was directed, as hereinbefore set out under the headings "Relative Cost of Service" and "Relative Earnings and Profits."

It must be borne in mind that the mere opinion of a witness as to the relative cost of the service, aside from the actualities which his evidence shows, is of little, if of any importance. When we establish what these items are, the correct conclusion is to be deduced therefrom, independent of the mere opinion of interested witnesses who may or may not have taken into consideration all of the items which should be considered, as the basis of a correct conclusion or calculation. This is wherein the Court was in error; not believing the point very material, the Court did not analyze the details, but accepted mere opinions. Want of space and time suggests the idea, which we shall pursue, that only such of the evidence as seems best to establish a given fact should be cited or quoted from the voluminous record under appropriate heading, hence we cannot refer to the various opinions expressed.

(1) The car loading of dressed meat, packing house products and live stock as a part of the published rate should be estimated from the minimum weights made a part of the tariffs; because, when the railroad company publishes its tariff, it publishes the minimum weight per car load, which becomes as much a part of the tariff as the rate itself. It may be that in

some instances the minimum weights are exceeded; it may be, as it does appear from the evidence, that upon the average the minimum weights are somewhat exceeded, but the shippers' right, and the obligation of the carrier, are defined by the rates per hundred pounds on a specified minimum weight per car as expressed in the tariff. These minimum weights found by the Commission and undisputed are as follows:

"On packing house products, 26,000 pounds; and on fresh and dressed meats, 20,000. The minimum pertaining to live stock vary according to the kind of live stock shipped and the length of the car used in each instance. The length of the car most generally used is 33 feet and 9 inches, and minimums pertaining to such a car are: On cattle 22,000 pounds, and on hogs, double-deck, 22,000, and single-deck 17,000." (See Rec., p. 572, confirming this finding.)

The evidence fairly establishes, however, that on an average the actual car loading of commodities in question is as follows:

Cattle, 23,000-25,000. (Record, pp. 572, 1235, 1309, 1310.)

Hogs, 17,600. (Record, p. 572.)

Fresh meats, 21,000 or 22,000. (Record, p. 1499.)

Packing house products, 28,000 to 29,000. (Record, p. 1499.)

(2) The train loading, that is to say, the number of loaded cars carried in trains transporting these different commodities, was the subject of voluminous evidence, and there were various opinions expressed, but all of them must of necessity be based upon the actual make up of the trains in which commodities are carried. The only reliable evidence of these facts is the actual representative train loading of trains carrying these commodities, as well as trains carrying all freight as shown by the train consists, taken from the Railway Records of trains, as follows:

C. M. & St. P. Ry.: trains out of Savannah, at crossing of Mississippi River eastbound. (Rec., pp. 905-912.)

First 15 days of February, 1904:

Total trains	160
Total cars live stock	1786
Total cars fruit	40
Total cars of other perishable freight	527
Total cars dead freight	1435
Total cars empty	871
Total cars	4659

Average per train, loaded 24.1, empty 5, total 29.1.

Trains carrying live stock, and live stock and other freight 92.

Average cars live stock	19.41
Average cars of other freight	10.00
Average cars of empties	2.85

Total cars per train, loaded 29.4, empty 2.85, total 32.26.

The Burlington Road train consists for 15 days of October, 1904, and 15 days of April, 1905, into and out of Galesburg.

Dead freight trains	440
Dead freight cars	12,059
Average loaded cars	27.40
Average empty cars	10.83
Average all cars	38.23
Train carrying live stock	786
Cars of live stock	11,377
Cars of other freight	16,468
Empty cars	3,808
Total cars	31,655
Average loaded cars per train having live stock	35.43
Of which average live stock	14.48
Average of other loads	20.95
Average of empties	4.84
Total cars per train	40.27

Similar results are shows of consist of trains into and out of Creston, Iowa. All trains having live stock have more loaded cars and more tonnage, gross and net, than trains not carrying live stock. Nearly all trains carrying meat or other perishable freight carry live stock. Trains having only live stock have more loaded cars than trains carrying meat.

The C. & N. W. train consist make similar showings.

The average is made up for all roads which furnished the train consist will make similar showings.

Since expenses of train service and nearly all expenses of carriage except car mileage and terminal expense and cleaning cars is by the train as a unit, that is the proper basis of comparative earnings, expenses and profits.

Trains loaded without live stock	68
Loaded cars	1082
Average per train	15.91
Empties	609
Average per train	8.96
Average cars per train	24.86

First 15 days in October, 1904:

Cars of live stock	1333
Cars dead freight	1522
Cars perishable freight	532
Cars other freight	169
Empties	485
Total	4041
Trains carrying live stock, and live stock and other freight	74
Average cars of live stock	18.01
Average cars of other freight	14.35
Average cars of empties	1.26
Total loads 32.36, empties 1.26, total	33.62
Trains without live stock	56
Loads	1161
Empties	392
Average loads per train	20.73
Average empties	7
Average cars per train, total	27.73

The Illinois Central Railway train consist for 15 days of April and October, 1900, shows a greater number of loaded cars for trains carrying live stock out of Ft. Dodge, Iowa, and Freeport, Ill., than in trains not having live stock. (Record, pp. 1666-1675.)

(4) The weights of stock cars and of the bedding was the subject of various opinions and some definite evidence. It is clearly shown that the weights of these cars vary considerably, which would naturally be so, and that the weights of the bedding varies considerably because of its accumulation and as the cars make trip after trip without being cleaned, the weight of the bedding would depend upon the accumulation to a large extent. But the bedding put in a car having old bedding is less than when clean. (Record, p. 1073.)

It is shown that on the whole the average weight of stock-cars in which live stock is carried is approximately 29,000 lbs. and that the average weight of the bedding is approximately 1,000 lbs. per car. The Commission found that the average is 28,000 pounds for the car and 2,000 pounds for bedding. (Record, pp. 1063, 1067, 1073, 1238, 1237.)

(5) The cost of cleaning cars varies according to the circumstances, the weather and the amount of bedding that is permitted to accumulate. It may be correctly stated that on an average the cars are not cleaned more than once every two months or six times per year, and that they make several trips without being cleaned (Record, pp. 1237-8), and therefore there should not be charged up as an item of cost the cleaning of every car. Probably the cost of cleaning a car should be charged for every third or fourth trip.

The evidence fairly shows that the cost of cleaning of the live stock cars for each cleaning will not average more than 50 cents, and that estimated on the relative basis of each car of live stock, 25 cents would more than cover the cost of cleaning. (Record, pp. 1631 and 1634.)

(6) The return loading of live stock cars is a material item as compared with the dressed meat and packing house product cars which have no return loading, with the exception of the Illinois Central. The evidence is not definite with respect to the return loading, nor the stock yards or the packing house product and dressed meat cars. It does show in practically all cases the dressed meat cars are returned empty, but the stock car is returned loaded to the extent of 20 per

cent. as found by the Commission of the return movement. (Record, p. ——.)

(7) Relative speed of trains carrying any two classes of commodities is not materially different. (Record, pp. 1298, 1430, 1905, 1298, 1300.)

(8) and (9) The weight of refrigerator cars and the ice salt and preservatives varies, but on an average will equal 44,000 pounds. (Record, p. 1498.)

(10) and (11) The return loading for refrigerator cars is rare and the speed of returning them is greater than in the return of the stock cars. (Record, p. 1508.)

(12) The car mileage cost in the case of refrigerator cars is 1c per mile, and the cost of stock cars where the cars of private car lines are used, is 6 mills per mile. The railroads own a large part of their equipment in which live stock are carried, but the most of them own none of the equipment in which the packing house products and meats are carried, except the Illinois Central.

(13) The terminal expenses and charges are relatively as found by the Commission. (See also, Rec., pp. 1111, 1507.)

(14) Loss and damage claims constitute an item about which the witnesses testified extensively, but the actual figures showing what the actual loss and damage really is on an average, were as follows: C. & N. Ry., 78 cents per car. (Rec., p. 1903.) C. B. & Q. Ry. about 40 cents.

(15) Stock yards expenses were the subject of much testimony and it is rather difficult to determine just what stock yards expenses are for handling livestock. It is quite certain, however, that it is not materially greater than the general station expense of handling the business. We have assumed that Mr. Gardner, General Manager of the Northwestern Ry. Co., stated the expenses high enough to cover this item, at $1.75 per car. (Record, p. 383.)

(16) Return transportation of attendants who go with live stock was the subject of a great deal of evidence and much magnified by many witnesses. It is undoubtedly absurd to charge up as cost the return transportation of passenger fares, as Mr. Stickney

and some others did in their estimates. Mr. Gardner estimated it at 2 cents per mile for ever third car, $3.40. Mr. Ripley considered it of little importance. (Rec., pp. 1130, 1131.)

The Commission found that this item of expense was offset by return loading for stock cars, which it had not computed.

Based on 20 per cent return loading in which 6 mills per mile would otherwise be added, it is clear that the return loading more than offsets any figure at which return of attendant can be placed.

(17) The relative distance of the haul of livestock on an average when hauled upon the same rate as the rates from the Missouri River to Chicago, is of material importance. The 23½c rate on livestock is charged from points within a zone about 125 to 165 miles east of and parallel with the Missouri River (Record pp. 1589-1590), half-way across the State of Iowa. The livestock within that zone moves partly to Chicago and partly to Missouri River. That which is closest to Missouri River naturally moves mostly to those markets, and for the sake of argument, we may assume that the average distance in that zone is at a point 75 miles from Missouri River, in which case the average haul in such case would be 425 miles, on the 23½c rate on livestock to Chicago, while from points of origin east of that zone the rates are less and the distance is less. On the Missouri River basis it may be said that the average haul of dressed meat and packing house products to Chicago is 500 miles, as found by the Commission.

(18) The relative cost of maintenance of cars seems not to be a very fair item of comparison in this case because there is no evidence with respect to the average cost per car mile movement of maintenance of refrigerator cars, because they are principally owned by the private lines. In lieu of owning a car and expense of maintenance, railroads pay 10 mills per car mile as a charge for meats and product which is shipped in cars which belong to other companies, and an allowance of 6 mills per mile as paid in lieu of the ownership and maintenance of stock cars. The relative cost can be best estimated upon that relative basis, for presumptively it is not greater. On the one part Mr. Stickney claimed a very heavy expense in the maintenance of stock

cars, but that cannot be correct, for if so the stock car line would go out of business at 6 mills per mile; on the other hand Mr. Ripley claimed a less expense for the maintenance of stock cars than ordinary cars. (Rec., p. 1132.) Between these two the witnesses varied, and it is safe to assume for the purpose of calculation that the basis on which the Commission made its figures of the allowance per car mile made to the private car line companies is a correct basis.

RELATIVE EARNINGS AND PROFITS.

(1) Gross earnings on dressed meat per car.

(2) Cost of the service and other expenses on dressed meat per car.

(3) Profits on dressed meat per car.

(4) Gross earnings on packing house products per car.

(5) Cost of service and other expenses on packing house products per car.

(6) Net earnings on packing house products per car.

(7) Gross earnings on hogs per car.

(8) Cost of service and other expenses on hogs per car.

(9) Net earnings on hogs per car.

(10) Combined cars of meat and products—earnings per car.

(11) Combined cars of cattle and hogs—earnings per car.

(12) Relative earnings per ton mile on each in detail.

(13) Relative earnings per mile on each in detail.

(14) Relative earnings per train mile on each in detail.

(15) Average freight earnings of each defendant per ton mile.

(16) Average freight earnings of each defendant per car mile.

(17) Average freight earnings of each defendant per train mile.

(18) Average operating expenses per ton mile—per car mile and per train mile.

(9-a) Earnings on cattle at 23,000 pounds per car 54.05

Car mileage; 430 miles haul to Chicago and return $5.16

Terminal and other expenses same as for hogs $3.25

Total.....$8.41

Net earnings on cattle.....$45.64

(10) We must, however, consider the combined average earnings and expenses of dressed or fresh meat and packing house products, because in making the rates they have always been so considered by the defendant railroads, and the Commission so considers it is a proper basis of the uniform rates on the entire product. To do this, we must take into consideration, as a material factor, the relative number of carloads of fresh meat and of packing house product. The definite and reliable evidence as to this factor is that contained in Mahoney's exhibit (Record p. 1392) showing the tonnage of each, east bound. Dividing the fresh meat by 22,000 pounds, it gives for 1902, 1903 and 1904 115,676 carloads of fresh meats, and dividing the packing house products by 29,000 pounds it gives for same period, 60,270 cars of packing house products.

By multiplying the cars of fresh meat by the average gross revenue of $42.35 per car, and the cars of packing house products by average gross revenue of $53.90, and adding the results and divide by the total cars of both, we have as a result $45.90 per car, as the true average combined gross earnings.

This result represents the average revenue per car of fresh meat and packing house products combined, at the average revenue actually received, upon basis of one-half going to Chicago at 20c rate and one-half east at 18½c upon the volume of traffic passing through Mississippi River crossings, which fairly represents the relative amount of each.

Manifestly this is the standard to use when comparing the rates and earnings on the product with rates and earnings on

hogs and cattle. This is so, because the showing is quite different in the relative earnings and expenses of fresh meat compared to packing house product, arising particularly from the heavier loading of packing house products and greater loss and damage to fresh meats.

(11) Combined earnings on hogs and cattle should for the same reason be computed. The rates on each are the same, but the loading of cattle carried on these rates will average 24,000 pounds or more (Record p. 1309), though the minimum weights in the tariffs is 22,000 pounds. Hogs load about an average of 17,400 pounds. (Record, p. 1499), though the minimum weight is 17,000 pounds.

It is estimated that the relative number of cars of cattle and hogs from the territory in dispute coming to Chicago, is 3 of cattle to to 2 of hogs, (See Record, p. ——), averaging net revenue cattle and hogs per car on this basis $40.

(12) to (14) Relative gross earnings per ton per car mile and per train mile on each.

Dressed meat on the 20c rate, per car $44; per mile, 8.8c; per ton mile, 8 mills.

Dressed meat on the 18½c rate, per car $40.70; per car mile, 8.16c; per ton mile, 7.4 mills.

Dressed meat on the average rate, per car $42.35; per car mile, 8.47c; per ton mile, 7.7 mills.

Packing house products on the 20c rate, per car $56; per car mile, 11.2c; per ton mile, 9.8 mills.

Packing house products on the 18½c rate, per car $51.80; per car mile, 10.36c; per ton mile, 9 mills.

Combined Earnings: Hogs, 425-mile haul, 23½c per 17,000 lbs; per car, $39.95; per car mile, 9.4c; per ton mile, 11.4 mills.

Hogs, 500-mile haul, 23½c rate, 17,400 pounds, per car $40.87; per car mile, 8.17c; per ton mile, 9.4 mills.

Cattle, 425-mile haul, 23½c rate, 23,000 pounds, per car $54.05; per car mile, 12.7c; per ton mile, 11 mills.

Combined earnings on cattle and hogs per car $48.41; per car mile, 11.2c; per ton mile, 10.7 mills.

Average train of 30 cars fresh meat (1,980,000 lbs. gross weight), 20c rate, $1,260.00.

Average train of 30 cars packing house product (2,160,000 lbs. gross weight), 20c rate, $1,680.00.

Average train of 30 cars cattle (1,620,000 lbs. gross weight), 23½c rate, $1,621.50.

Average train 30 cars hogs (1,440,000 lbs. gross weight), 23½c rate, $1,226.10.

Average train 25 cars meat (equal weight to 30 cars cattle), $1,100.00.

Per train mile, 500 miles, fresh meat, $2.52.

Per train mile, 500 miles, packing house product, $3.36.

Per train mile, 500 miles, meat 25 cars, $2.20.

Per train mile, 425 miles, cattle, $5.81.

Per train mile, 425 miles, hogs, $2.88.

(15) Average freight earnings of the principal defendants, all freight per ton mile, per car mile, and per train mile, and operating cost for same items, taken from annual reports (Record, pp. 1871, 1691, 1980, 1865, 1690), are as follows:

Year.	ROAD.	Gross earnings per ton mile.	Gross earnings per car mile.	Gross earnings per train mile.
1904	C. B. & Q. Ry.....	8.7 mills.	12.85 cts.	.....
1903	C. G. W. Ry.....	8.7 mills.	11.36 cts.	$2.03
1902	C. R. I. & P. Ry.....	1.04 cts.	....	1.84
1902	C. & N. W. Ry.	8.1 mill.	11.34 cts.	2.03
1902	C. M & St. P. Ry....	8.4 mills.	11.21 cts.	2.13

E.

COMMERCIAL RELATION OF LIVE STOCK AND ITS PRODUCT AND VALUE OF THE SERVICE.

(1) Markets for sale and slaughter, Missouri River and St. Paul.

(2) Markets for sale and slaughter, interior.

(3) Sources of disposition of product.

(4) Growth of Missouri River markets, total receipts.

(5) Growth of Chicago markets, total receipts.

(6) Growth of interior markets, total receipts.

(7) Growth of St. Paul markets, total receipts.

(8) Increase in live stock westbound to Missouri River.

(9) Increase in live stock from Iowa and Minnesota to Chicago.

(10) Difference in price is the difference in rates.

(11) Effect on shippers.

(12) Effect on Chicago market.

(13) Character of the markets compared.

(14) Effect on complainants, the Live Stock Exchange.

(15) Value of hogs and cattle compared to the fresh meat and prepared products.

(16) The percentage of weight of product to weight of live animals. (Record, p. 1573.)

(17) Relative value of the service.

Items (1) to (9) inclusive are not a matter of dispute or conflicting evidence. Items (4) to (8), inclusive, are shown by tables which are not questioned. Item (9) is uncertain, but not in dispute. Item (10) depends upon evidence of witnesses hereafter shown, is naturally indefinite, but not a matter of serious controversy. Items (11), (12) and (14) are in dispute, and the Court finds that the effect of existing relation of rates does not materially injure the shippers and Chicago market. The Commission found to the contrary. Item (13) is not in dispute. Item (15) not in dispute though exact value not shown. Item (16) not materially in dispute. Item (17) while conjectural, not in dispute.

The commercial relation of live stock and the products thereof is such that the lower rates on the products than the live stock, subjects the live stock, the shippers thereof and the market at Chicago to an unreasonable prejudice and disadvantage.

(1) and (2). The markets for the sale and slaughter of live stock originating in the district involved, are principally at Kansas City, St. Joseph, South Omaha, Sioux City, South St. Paul, and interior points, Cedar Rapids, Ottumua, Des Moines, Oscaloosa, Mason City, Marshalltown and other small hog packeries. (Rec., pp. 576-583-554.)

(3) The source of disposition of products are the various consuming markets throughout the country, and for export as found by the Commission. (Rec., pp. 606, 600.)

Q. Is it from their purchases in the other markets that controls their prices here in Chicago, or is it the prices paid in Chicaga that control the other markets?

A. Chicago is recognized as the largest market, as I have testified, and necessarily the prices here would have an effect in controlling and influencing the values of the cattle in other markets.

Q. So it is the price paid for cattle here in Chicago that controls the price in these other markets, as I understand you?

A. To a certain degree, yes.

(14) The effect on the Chicago market of the Missouri packers and the interior packers and those at St. Paul being able to ship the product so much cheaper than the live stock necessarily is to divert the traffic away from Chicago market and to the other places to the extent of their capacity to take care of it, and their disposition to pay for the live stock what could be obtained for it on the Chicago market, less the freight which the shipper would have to pay were he to ship.

(15) The comparison of the size and character of the market shows beyond dispute that Chicago is the controlling market and that prices are fixed as nearly as such prices can ever be fixed by reference to the Chicago market. (See Record, p. 897.)

That the number of buyers and the number of live stock sold are very much greater than at any other market.

Not only is it the market for the sale of live stock, but it is the market for the sale of the product, and as shown by the testimony, the product of the output of the small markets in the interior parts of Iowa is based upon the Chicago prices.

(16) It naturally must result that the Chicago Live Stock Exchange and the members thereof who are selling live stock must suffer in their business in proportion as the number of live stock is diverted in other directions.

We submit, therefore, that the Court erred as specified in assignment No. 12 in holding that the lower rates on products of live stock than on the live stcok, has worked no injury to the shippers of the latter; and as specified in assignment No. 13 in holding that the present rates complained of in these causes are reasonably fair to Chicago and to the shippers of live stock; and as specified in assignment No. 33 in finding as a fact that:

"The welfare of the public, including the shippers, consumers and all localities and markets, does not seem to be materially affected by the present rates."

The commerce of the country and the direction and volume of its movement is quick to respond to advantages to one locality or commodity as compared to a competing locality or commodity. In the multitude of these advantages and disadvantages, and the infinite variety of circumstances and conditions of trade, it is impossible to determine with exactitude or often even approximately the extent to which a manifest preference or advantage affects the volume of traffic or trade of a particular sort as compared with competing articles, or the volume of the business in either or both at competing localities.

In the world of trade and commerce, the law of supply and demand as affecting prices is of first importance, yet a decade has witnessed the stifling of competition to such an extent that prices of important articles of commerce and profits in business of particular sorts or at particular places have been and are controlled more by the artificial advantages and disadvantages produced by powerful agents of commerce than by the law of supply and demand. The advantage, commercially and otherwise, of centralization of capital in great manufacturing concerns, has its tendency to eliminate competition and concentrate in a few hands great business enterprises.

This accomplished, the concentrated force may command the arteries of commerce to give still further advantages, which in turn brings its consequent disadvantage to those adversely affected, however diffused it may be.

In no line of business have these things been more clearly demonstrated than in the meat packing business. The sale of the cattle and hogs of the Iowa farmer must ultimately be to one or more of a few packing concerns or buyers; the capital, industry and business acumen, if not other causes, have naturally given the few buyers a decided advantage over the individual among thousands whose daily labor finds its reward in the price for which he can sell a carload or two of fat cattle or hogs. The packer is a manufact-

urer, a shipper; he buys and slaughters at Missouri River, St. Paul and Chicago, or perchance at St. Louis. He ships the product throughout the world. The buyers of cattle and hogs for butcher and other purposes must come in competition with the packer at the markets of sale; the product must come in competition wherever sold with that of the packer. This being so, it follows that, if to the reasonable and natural advantage of shipping the more concentrated and valuable product by the packers, virtually putting two carloads of live stock in one of product, there be added an advantage of a less rate per 100 pounds, than on the live stock, the packer has the commercial advantage to that extent and the advantage produced from purely artificial cause, viz: the act of the railroads in giving the lower rate. This advantage is due to the power of the packer to command the railroads to so compete for his business as to give the advantage.

The Commision held that whatever the facts may be as to the compulsion, it is an unjust and undue preference and in favor of the packers and subjects the live stock shippers and affected localities to an unjust and unreasonable prejudice and disadvantage. To this the railroads reply that it is not undue or unjust, because they were compelled to reduce the dressed meat and packing house product rate, by the packers, and that therefore the advantage was not undue or unjust, nor the prejudice or disadvantage to the live stock shippers unjust or unreasonable. That the live stock shipper not being in an attitude to command similar competition from the railroads to reduce live stock rates, the disadvantage of the higher rates is just and reasonable to him; while the packer having the power to compel the preference or advantage, the same was due and just. That although it could be relieved against by reducing the live stock rates, yet as that would cause the railroads to make less money out of the live stock shipments, they should not be required to do so. The result of which is that the railroad should be permitted to violate the law by the relative rates they maintain, and justify it upon the ground that by doing so they can make more money; or in other words, that the live stock shipper shall be compelled to pay the price of the preference given to the packer. The Circuit Court took this view; and having done so sought to sustain it by making the declaration

that the shippers of live stock were not materially affected; and in turn sought to sustain this last conclusion by the declaration that shipments had not been diverted from Chicago by the publication of the rates (which are the previous rebated rates); and in turn sought to support this last conclusion by the alleged fact that the volume of the business at Chicago from the affected localtiy, shows no diminution. The actual rate remaining the same, what change could be expected? Yet the fact (as assumed, though not correct), that the amount of business had shown no sudden decline, was proof that the difference in rates was not unjust for the reason that there would have been a change in the direction and volume of the business had the rates affected the shipper; therefore, the shipper must be condemned to pay more than the packer and pay it on a less valuable article, because he did not change the direction of his shipments and volume of business upon the railroads making public in a published tariff the secret rate they had been giving the packers all the time for ten years. And it further results that he who can get an advantage may keep it because he can; he who suffers the disadvantage must continue to do so because he cannot help it; and because he cannot help it, the advantage becomes just as to him, and the preference becomes due to him who can keep it.

F.

EXPENSES OF OPERATION APPLICABLE ALIKE TO ALL TRAFFIC.

MAINTENANCE OF WAY AND STRUCTURES.

(1) Roadway; (2) rails; (3) ties; (4) bridges and culverts; (5) fences, road crossings and cattle guards; (6) buildings and fixtures; (7) docks and wharves; (8) telegraph; (9) stationery and printing.

MAINTENANCE OF EQUIPMENT.

(1) Superintendence; (2) locomotives; (3) passenger cars; (4) freight cars; (5) work cars; (6) shop machinery and tools; (7) stationery and printing; (8) other expenses not enumerated.

CONDUCTING TRANSPORTATION.

(1) Superintendence; (2) engine and roundhouse men; (3) fuel for locomotives; (4) water supply for locomotives; (5) oil, tallow and waste for locomotives; (6) other supplies for locomotives; (7) train service; (8) train supplies and expenses; (9) switchmen, flagmen and watchmen; (10) telegraph expenses; (11) station service; (12) station supplies; (13) switching charges; (14) the use of cars and locomotives—balance; (15) loss and damage; (16) injuries to persons; (17) clearing wrecks; (18) advertising; (19) outside agencies; (20) stock yards and elevators; (21) rents for tracks and terminals—balance; (22) rents of buildings and other property; (23) stationery and printing; (24) other expenses not enumerated.

GENERAL EXPENSES.

(1) Salaries of general officers; (2) salaries of clerks and attendants; (3 general office expenses and supplies; (4) insurance; (5) law expenses; (6) stationery and printing—general offices; (7) other expenses not enumerated.

These are the items of expense required by the general orders of the Interstate Commerce Commission of which the Court takes judicial notice, and are shown in the printed annual reports of the C. M. & St. P. Ry. (Rec., p. 1648) and others of the defendant carriers, in the original record. From this enumeration it is plain that the expenses apply alike to all freight traffic except the following, which may be different, dependent upon the speed: (1) maintenance of locomotives; (2) maintenance of freight cars; (3) fuel for locomotives; (4) train service; and the following items dependent upon the class of traffic: (1) station service; (2) switching charges; (3) use of cars; (4) loss and damage; (5) injuries to persons; (6) stock yards.

The difference, therefore, in operating expenses in the transportation of dressed meats and packing house products on the one part, and live stock on the other, would depend upon the difference only in these items.

The evidence shows that the speed of fresh meat, packing house products and live stock is substantially the same, and that

they are carried on the same trains, hence these items can not be materially different. This is an indisputable fact because the fresh meat packing house products and live stock move in the same trains. (Record of Trains Consists, 1779, 1820, 1798, et seq.)

The train service is paid for by the train mile and there can be no substantial difference, therefore, in that particular.

The relative switching charges or terminal expenses have been elsewhere shown. So also as to the use of cars, locomotives and injuries to persons, and stock yards expenses.

The conclusion which the Court seems to have reached that the expenses of handling the traffic is so much greater than in the case of live stock, dressed meats and packing house products is therefore not of value in the absence of an analysis of the details of expenses of operation and a comparison of those expenses incident, not identical in kind and amount.

It is true, that many witnesses expressed the opinion in conformity to that of the Court on this subject, while others expresed a contrary opinion; yet in each case the correctness of the opinion must depend upon the correct ascertainment of the details of the difference in the expenses. For example, Mr. Crosby, freight traffic manager of the C. B. & Q., testified (Rec. p. 243):

"I believe that we can handle packing house products under the present condition of affairs, for less money than we can live stock. I believe we have less net money when we get through handling our live stock, than we do with the products." * * * * "When you consider the service I think it is less."

On cross-examination (Rec. p. 265), is the following question and answer:

Q. Do you know as a matter of fact, whether it costs you more money or less money per car, to handle live stock which you haul from the Missouri River to Chicago, than the packing house products or the dressed meat which you haul from the Missouri River to Chicago?

A. I don't just know exactly what the difference in cost is.

Again, he says (Rec. p. 266):

Q. On what train do you usually move live stock products?

A. We have a train that handles that business that leaves the Missouri River at 1 o'clock every day.

Q. One o'clock in the afternoon?

A. Yes, sir.

Q. And according to your schedule, what time is that train due in Chicago?

A. I think about 6 o'clock * * * the next afternoon.

And again (Rec. p. 267), the witness testified:

A. At the present time our train schedule from Western Iowa is entirely different from the packing house train. We aim to make here (Chicago) in the morning, and we make that schedule, I don't know exactly what the time is because I have not charged myself with it, but we have a schedule from Western Iowa that enables a man there to load today, for example, and make his market day after tomorrow. I don't know the exact hours to get that, but between stations I am inclined to think that that train must necessarily run a good deal faster than our meat trains do. But the time shown for each is not materially different.

An examination of actual train consists (Rec. pp. 1818 to 1853), shows that more than two-thirds of the trains carrying meat carry also live stock, and so of train consists of other roads.

Later on Mr. Crosby gave a statement of the different items of expenses of the live stock traffic, not involving any expenses of handling the dressed meat, as follows: (Rec., pp. 295-6.)

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"What the carrier does and is expected to do in the matter of handling live stock, that is not required or expected in the handling of other traffic:

1. Yards must be built at shipping point so that shipper can pen and load his stock.

2. Attendant is passed in charge to look after the stock.

3. Return pass is given to starting point.

4. Specially equipped caboose car is attached to train for convenience and comfort of attendants, generally provided with sleeping bunks.

5. Where stock is in transit, or liable to be twenty-eight hours or longer, feed yards have to be provided for feeding, watering and resting.

6. In the case of hogs, they are wet down with water at convenient points in transit during hot or warm weather.

7. The carrier is expected, in fact required, to make better time in transit than with ordinary freight, in consequence cannot get maximum use of his power, as faster speed means less tonnage.

8. In case of failure to market, claims for damage are made.

9. In case of delay from any cause, or rough handling, claims for shrinkage are made.

10. If animals injure each other, get crippled or killed in transit, claims are made.

11. Stopping to feed, water and rest, means loss of use of cars and engines for period of five to twelve hours. Means cars have to remain at feeding point, or if moved away, other cars have to be provided which means extra expense not incurred with any other class of freight.

12. Live stock trains are given preference over other freight trains.

13. Injuries to attendants.

14. Requires special class of equipment."

A REVIEW OF THESE ITEMS SHOWS:

(1) Mr. Crosby did not state, but Mr. Gardner, Generel Manager of C. & N. W. Ry., stated that the expense of owning and maintaining stock yards and all service in receiving live stock was, by his estimate, $1.75 per car.

(2), (3), (4) As to cost of returning attendants, the Commission holds that to be offset by return loading of the stock car as compared to no return looking for the refrigerator car.

(5), (6) The watering of hogs is by turning a sprinkler on as the cars pull slowly by a water tank and is practically no expense. (Rec. p. 1295.)

(7) The facts show no greater speed for live stock than the packing house products and dressed meat previously shown herein, and it is conclusively shown that there is greater, rather than less, tonnage per train mile of live stock, as hereinbefore shown.

(8), (9), (10) The loss and damage claims which cover these items are shown to amount to about 40c per car on the Burlington Railroad, and about —- cents per car for the dressed meat and packing house product. (Rec., p. 301.)

(11) If the speed which he states is made, the live stock does not stop for feeding, rest or water. The stopping for feed and unloading results from poor service or from accident.

(12) The live stock trains do not interfere with other traffic more than the meat trains.

(13) Injuries to attendants is embraced in the loss and damage item.

(14) Special class of equipment simply means the 6 mills per mile as compared to the 10 mills per mile for the refrigerator cars.

G.

COMPETITION BETWEEN CARRIERS AS A FACTOR.

(1) The number of railroads from Missouri River points to Chicago.

(2) The competition for the meat and products at the Missouri River.

(3) The competition for the meat and products at St. Paul.

(4) The competition for the meat and products at interior points.

(5) The competition maintains existing rates.

(6) The competition for live stock at Missouri River.

(7) The rates established by concurrence have been maintained for years.

(8) No competition for live stock, affecting rates.

(9) Rates from territory 125 miles east maintained to common line.

(10) Numerous common points of intersection in Iowa.

(11) Chance of competition same as at Missouri River.

(12) Shipment to Gulf only of packing house products, not meats.

(13) Shipments to Gulf inconsequental.

None of these items is in dispute as to the facts; the Court holds that competition for the dressed meat and packing house products justifies the difference in the rates on the same and the rates on the live stock. As we shall see, that is a matter of law.

VI.

COMPETITION.

(1), (2) The defendants whose lines reach Chicago all serve the Missouri River markets at St. Paul, and the intervening territory in Iowa and Wisconsin and Minnesota on their lines respectively, except the C. & N. W. Railway does not reach Kansas City or St. Joseph, and the G. C. W. Ry., C. & N. W. Ry. and C. M. & St. P. Ry. do not go directly over their own rails to St. Joseph. There should be a map in the original record to show these locations of various railroads.

(3) The C. M. & St. P. Ry., C. G. W. Ry., C. B. & Q. Ry., C. & N. W. Ry. are the competing lines from St. Paul, but it is reached by the Minn. & St. Louis Ry. and C. R. I. & P. Ry.

(4) The interior packing points are:

Cedar Rapids, Iowa, served by the C. & N. W. Ry., C. M. & St. P. Ry., Iowa Central Ry. and C. R. I. & P. Ry.

Des Moines, Iowa, served by the C. G. W. Ry., the C. R. I. & P. Ry., C. M. & St. P. Ry. and C. B. & Q. R. R.

Oscaloosa, Iowa, served by the C. R. I. & P. Ry., the C. B. & Q. R. R. and Iowa Central Ry.

Ottumwa, Iowa, served by the C. M. & St. P. Ry., C. B. & Q. R. R. and C. R. I. & P. Ry.

Marshalltown, Iowa, served by the C. & N. W. Ry., C. G. W. Ry. and Iowa Central Ry.

Boone, Iowa, served by the C. & N. W. Ry., C. M. & St. P. Ry., Iowa Central Ry. and C. R. I. & P. Ry.

Iowa Falls, Iowa, served by the Illinois Central Ry., the C. R. I. & P. Ry., the C. & N. W. Ry. and D. M. Ia. F. & N. Ry.

Mason City, Iowa, served by the C. M. & St. P. Ry., C & N. W. Ry., C. G. W. Ry. and Iowa Central Ry.

Austin, Minn., served by the C. G. W. Ry., C. M. & St. P. Ry. and the Iowa Central Ry.

(5) and (6) The connection made by these roads bring them substantially all in competition for all traffic, and their rates are and have for years been made the same from the same locality geographically, as is shown by all the tariffs.

(7) It results that the published rates are and have been uniform on live stock, fresh meats and packing house products for many years. They all join in making and maintaining them because they are competitive.

(8) The competition for live stock including this uniform adjustment arises from the fact that there are numerous junctions of various lines of the principal systems of railway all over Iowa and the zone 125 to 150 miles east of Missouri River as well, as seen by examining the map, but want of space forbids a description here, which the map will more clearly show. The very same uniformity of published live stock and packing house product rates to Chicago from Missouri River and St. Paul has existed for years at the intermediate points. This likewise applies to uniformity in the proportional rates or balances of rates on which live stock originating west of Missouri River and St. Paul move onto Chicago. Every result which comes from competition for local shipments of live stock from Missouri River has always applied and does apply to shipments going to Chicago from points east of Missouri River. It is not true, therefore, that a competition exists between railroads at Missouri River for live stock, which does not exist at intermediate points, and that such competition comes from more railroads. Exactly the reverse is true namely, that the rates being the same on live stock from Omaha, reached by all the carriers to Chicago, as from a station served by one of them only, 20 miles east, therefore there is no competition at Omaha.

No other conclusion can be reached than that competition is eliminated and has been for years on live stock from both the Missouri River and the interior points. It is 23½ cents per 100 pounds from so large a territory, including Missouri River points,

that competition is clearly not a factor, either at Missouri River or intermediate points.

The fact that there exists established balances of the rates or proportional rates on live stock originating west of Missouri River or St. Paul when carried to Chicago, cannot affect the question, except to show the local Missouri River, Chicago rate, because in such cases the through rate via Missouri River to Chicago was from the point of origin west of Missouri River, with privilege of sale at Missouri River, and if not shipped on, then the local rate is paid at Missouri River; if shipped on, it goes at the through rate as from point of origin. If it is an advantage, it is to the shipper from west of Missouri River and cannot by any possibility inure to the advantage of the shipper who drives into Missouri River points or ships from a point east thereof.

COMPETITION IS NOT CONTROLLING.

1. Competition, in the sense in which the term has been used in the several cases decided by the Supreme Court of the United States, has never been regarded as controlling or decisive either as a matter of law or of fact, except that under the fourth section of the Act, where the alleged discrimination and preference arose from the mere fact of charging more for the shorter than for the longer haul in the same service, in the same direction, over the same line, it has been held that competition at the longer distance point which does not exist at the shorter distance point constitutes a dissimilarity of conditions at the two points, and therefore the fourth section is not in such a case violated by the lesser rate to the longer distance point. That is, as applied to that character of discrimination under that section of the statute, the carriers have the right to charge less to the longer than to the shorter distance point. (East Tennessee, Virginia & Georgia Ry. Co. v. Interstate Commerce Commission.)

2. Under the third section of the Act prohibiting undue preferences, etc., as between localities, persons and different classes of traffic, the question of dissimilarity of conditions does not constitute an exception or qualification, no matter whether the dissimilarity is produced by competition or otherwise; for it must

have been contemplated that in all cases of undue preferences as between different classes of traffic and of individuals engaged in it, and of different localities, there must exist a dissimilarity of conditions in the one case as compared with the other, for it is manifest that each different class of traffic and each different locality is dissimilar to the other; hence if the dissimilarity of conditions shall justify a violation of the third section, no violation of that section could ever occur, which, of course, leads to an absurdity. Therefore under the third section it is necessarily to be implied that a dissimilarity exists; and it is a part and parcel of every such case; and the question in each case involving a violation of that section would be whether, considering this dissimilarity, still is the preference or discrimination in the given case an undue or unreasonable one? Competition, be it great or small, has not been by the statute given any greater force than any other circumstance or condition in determining whether a given preference or discrimination is undue and unreasonable, though it may constitute a dissimilarity under the fourth section. It is not a talismanic word, either in law or in fact, and it cannot be held to justify the preference, if under all the circumstances, in the judgment of the tribunal called upon to determine the fact, there is an undue or unreasonable preference or advantage or an unjust discrmination.

3. The competition in this case is not that character of competition which has been held to be controlling in some cases, because in all of those cases where it has been regarded as a controlling factor a state of the case was shown where the carrier, in order to meet the rates made by some methods of transportation independent of the defendants before the Court, was under the duress of the circumstances compelled to make the rate or do without the business. In no case were all the parties who participated in the transportation and who made the rates, and themselves produced the competition, before the Commission or the Court and subject to the order or decree. Here all the carriers making these rates are before the Court, and the order of the Commission, if enforced, therefore, cannot have the effect of depriving any of them of the business. If it did, still it would not be a controlling factor, but simply a matter for the Commission in the first instance to consider.

When analyzed there is nothing to the competition so-called in this case aside from the desire of the carriers for the business; the motive being to make money. Shall the desire to make money, that is the motive which induces the undue or unreasonable preference, be taken as an excuse for the violation of the law? Can the preference and advantage be rendered reasonable simply because the carrier desires to put in effect rates which will produce the preference in order to make money? If so, no rate could ever be unreasonable, and no preference could ever be an undue one, for the carrier could always insist that it was due, that it give such preference if the carrier would be benefited in so doing, regardless of the interest of shippers of the articles discriminated against. Such a rule makes the desire of the carriers the standerd of what is due and reasonable.

4. This case is different from all others reported and referred to in the opinion of the Circuit Court, in the particular that the rates on the meats and other products of live stock were fixed solely by the carriers who are before the Court, and likewise the live stock rates were fixed by the same carriers. At first the actual net charges made for the transportation of the products of live stock were the result of a secret and unlawful combination to give to the shippers of the meat products a rate which was really less than the published rate, which was unlawful. When they were enjoined from this violation of the law, these actual rates were then restored to the published rate without any change in the tariffs. Not being satisfied to require of the shippers of dressed meat the payment of a rate equal to the live stock rate thus made effective, the Chicago Great Western Railway Company made a contract to carry the products of the live stock at the amount of the present published rates, and to so publish its schedules of rates, and thereupon all of the defendants did the same thing. Now, the violation of the law, as held by the Commission, arose, not out of the fact of making a rate on the live stock product less than is reasonable, but because the law prohibited any undue preference or advantage in the making relative rates on different sorts of traffic. There was nothing to prevent these carriers from making a relatively reasonable rate on live stock at the time they made the rate on packing house products and dressed meat. The undue profer-

ence results from not having done so. It can not be disputed that there is competition for the live stock shipments, but whether there is or not is immaterial, for the preference may be as much undue and unreasonable as against the shipper for whose traffic the railroads do not see fit to compete with each other to the point of reducing rates, as where there is the strongest sort of competition. The law does not intend that because the carriers do not consider the competition in live stock traffic as a sufficient inducement to cause them to reduce the rates to the level of the product rates, that therefore they are not liable for producing an undue preference or subjecting a class of traffic to an unreasonable disadvantage. If it did, then the question as to whether or not the action of the carrier in a violation of law would depend entirely upon the will of the carrier, the doing of the thing would be its justification, which is the grossest absurdity.

5. The argument that because a given line of railroad is not bound to apply as low a rate at the shorter distance point as at the longer distance point, in order to avoid violating the third section of the Act, is not sound, because in every case where it was so held, it was based upon the fact of a dissimilarity of conditions, giving the implied statutory right, by virtue of the fourth section, to charge less at the longer distance point, not on a particular kind or class of traffic, but on all traffic; and in such case a preference arising solely from that cause may not be an undue or unreasonable one. (L. & N. Ry. Co. vs. Belmer, 175 U. S., 648.) But that is not the question here at all. The question here is whether the prejudice is undue respecting the particular classes of traffic, the one as compared with the other, and whether in the matter of such preference particular localities are subjected to a disadvantage, not generally, but with respect to the particular classes of traffic. The main point, therefore, is whether, having reduced the rates on one kind of traffic, it gives an unreasonable preference to that class of traffic to the unreasonable prejudice of a competing article in the markets and to the shippers thereof. That every one must be held responsible for the consequences of his own act is a fundamental principle of law. One of the consequences which the carriers must have contemplated was that they must restore the just relation of the rates, although it

might affect the carrier's earnings, because of their inability to do that by advancing the rates on live stock. The whole matter, reduced to its last analysis, is that the carrier may not create the undue preference or advantage and maintain it simply on account of the fact that it would make more money by doing so than by restoring the just relation of the rates, either by reducing the one or advancing the other. Without doubt the Commission correctly so held.

6. A preference may not be given to one article over another where it arises or is given merely to suit the desire of either the shippers of that article or the railroads which haul it, and in determining whether or not the preference is an undue or unreasonable one the desire of the shipper to enjoy it and the carrier to give it as an inadmissible fact when offered to prove that the preference given is a reasonable one. One's desire to do an unreasonable thing cannot make it reasonable. The fact of reasonableness must be determined aside from such desire. The competition, as it is called, in this case, as we have shown, amounts to nothing more nor less than this desire.

If the competition which existed as between the carriers themselves rendered this order of the Commission unlawful, then the bill was subject to demurrer, because the fact of such competition is as fully set forth in the opinion and report of the Commission as it was proven before the Court.

Considerable stress was laid by some of the witnesses upon the point that if you add the rate on the live animals to Missouri River markets to the rate on the product from Missouri River markets to Chicago, or to do the same thing with respect to Cedar Rapids and other interior points, and compare the same to the rate from the point of origin of the live stock direct to Chicago, that the former would be in most cases greater than the latter. Of course that will always depend upon what the point was that was selected. In some cases that would be so, and in other cases it would not, as shown by the tariffs. But conceding that it would be so in all cases, the two services are entirely distinct. The railroad ships the live animals at the expense of the owner. He pays the freight; it is deducted out of his account sales; the packer has nothing to do with it. Shipment of the product may be by way of

Chicago or elsewhere, or the product may be consumed at the Missouri River or points west. If it has been considered, the fault in the argument lies in the fact that if the live stock shipper either drives his live stock in to the Missouri River points or ships them in, he could with as much reason add the rate to that point to the rate from there to Chicago as proving the undue preference, as the packer could. And so with respect to shipments to Cedar Rapids or other interior packing points.

That same contention was made in the Chicago Board of Trade case, decided October 16, 1890 (3 I.C.C. Rep., 233), and the Commission in that case expressly decided that no such method could be made use of for the purpose of showing that a preference was not in fact given, and in so deciding used the following language, after quoting some previous decisions of the Commission:

> "The Commission held that a separate local haul of freight, complete in itself, could not be added to another different and subsequent haul of the same freight as an element in the adjustment of relative rates between the last haul and a haul of similar freight from still another and different point on the same line to the same common destination. Here the haul of live hogs, for example, to Sioux City, is one separate, distinct and complete service for which the carrier is paid its rate. Then the haul of the product from Sioux City to Chicago is another distinct, separate and complete service for which the carrier is paid its rate. Now, is it not fair or lawful to add these two separate and distinct rates thus earned upon different articles together, and then to say that for an equal number of live hogs shipped from the same point in Iowa or one equally distant to Chicago, the Chicago packer or buyer must pay a rate equal to that combined rate first on the live hogs to, and afterwards on the product from Sioux City? There is no element of justice or fairness in it."

The contention was also made in that case, as it is made in this, that a difference in the rate was justified because the establishment of these packing houses furnished the defendants with

more tonnage than if the animals were shipped from that part of the country to Chicago for packing purposes or to Eastern packers or markets, enumerating various items of additional freight that was created for the company by the establishmeat of the packing houses. This point was overruled by the Commission.

The point was also made in that case that there was a shrinkage in the live stock being shipped from the Missouri River with the longer haul, and that, commercially speaking, it was better for them to be slaughtered at the Missouri River. This contention was made by intervenors similarly situated to some of the intervenors in this case. The Commission disposed of that point by saying:

"But it is impossible to conceive upon what principle either or both of these considerations can justify the giving of preferential rates as shown by the intervenors and others similarly situated, and the burdening of buyers and packers at Chicago with the oppressive discrimination shown in this proceeding."

VII.

ERROR OF THE COURT IN OVERRULING THE FINDING OF THE COMMISSION THAT AN UNDUE PREFERENCE EXISTED, AS SET OUT IN ASSIGNMENT OF ERROR 15.

That the Circuit Court did not consider the Commission's conclusions as of any material importance, is evidenced by the following expression in its opinion:

> "The Court also considers the conclusion of the Commission to be the proper conclusion, unless overcome by other testimony produced upon the hearing, although perhaps not required to do so."

The question at last to be determined, was whether the preference and discrimination was undue, unreasonable or unjust, which, though being a question of fact, as held by this Court in Tex. & Pac. Ry. Co. vs. I. C. C., 162 U. S., 197, was one for the Commission's determination in the first instance. It is necessarily a conclusion of fact, and as the Court reached a different conclusion

to the Commission, the correctness of it ought to be and is a matter of judgment rather than of evidence.

It is remarked by the Court, Subdivision 2, that the witnesses for the railroad companies agreed upon certain items of expense, but the Court does not state what the amount of those items were, and it is not shown wherein they differed from the items as found by the Commission. The Court states:

> "All the witnesses agreed in the showing that the cost of service in proportion to the value of both kinds of commodities, was greater in carrying the live stock."

The fact is that the record may be searched in vain for a single item of evidence upon the subject. The Court states that one of the expenses was "providing stock yards at every shipping place, costing from $800 to $1,200 and $1,400." We believe that no witness claimed that every stock yard cost as much as $800, but they claimed various averages of the total detail of all stock yards, including very expensive yards at certain terminal points, as bringing up the average. The value of evidence describing the stock yards showed plainly that they are very meager and inexpensive affairs, worth a few hundred dollars at a large per cent of the stations. (Record, pp. 1039, 1040, 1049, 1065, 1071, 1291-2-3.) The items of the extra cost which the Court points out, as applying to meats and packing house products, were refrigerator cars, terminal charges and heavier cars; as to live stock, carrying attendants, stock yards, damages for delays and wrecks. It is not indicated by the Court that either of the items was proven to be different to that found by the Commission. The evidence does not dispute the Commission's findings on this point.

The Court noted (Para. 3) the fact that the value of the meats and products was nearly twice that of the live stock.

In this same connection the Court stated that:

> "It was also substantially agreed by the witnesses that the risk of carriage, notwithstanding the double value of fresh meat, was not as great in carrying fresh meats and packing house products as in carrying live stock. This is true on account of the damages for delay to live stock and additional damages in cases of wrecks. There

is not much danger of wrecks in either class of business on account of the good condition of the road bed and equipment of the railroad."

The Commission held that the difference in the items of risks—that is loss and damage, was so small as to be unimportant. That finding is not controverted. As elsewhere shown the loss and damage per car as to both the live stock and the dressed meat, is less, and in most cases materially less, than one dollar per car, on an average, including personal injuries to attendants of live stock.

The Court held (Para. 4, Subdivision b):

> "The cost of the service of carriage. This has not been an important factor in the opinion of the railroad companies in the past nor their practice, but in this case all seemed to agree that the cost of service ought to be an important factor in determining the rate. Mr. Stickney was of the opinion that the cost of service arrived at intelligently by a body of experts, would be the proper basis upon which to determine fairly to everybody the rate to be adopted, and this could be mathematically figured out all over the country. The other witnesses stated that the cost could not be obtained at all accurately, only approximately."

The Commission held that the difference in the cost did not justify the discrimination.

In its findings of fact (Para. 3) the Court pointed out that the value of the service was not so important in this case because of the greater risks in carrying live stock; yet the difference is not found as a fact and as elsewhere shown is not material.

In the foreging particulars only, is there even a pretence of disagreement concerning the facts found by the Commission and as proven before or found by the Court, hence argument of questions pertaining thereto should be directed to the disputed points, as we have endeavored to do.

In its Sixth finding the Court said:

> "That the present rates have not materially affected any of the markets, prices or shipments; that they are reasonably fair to Chicago and to the shippers; that the

shipments of live stock from points between Chicago and the Missouri River and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of live stock comes to Chicago from points as near as 150 miles this side of Missouri River and St. Paul, and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock."

The Court in paragraph 6 of its opinion found that:

"On fresh meat and packing house products rebates were given making such rates below 18 cents," and the Commission found this to be the case.

In view of these facts, the finding of the Court that the rates had not affected the volume of the traffic, at each market, or the direction of its movement, is of no importance. The commerce moves according to actualities. It could not be doubted that if it is fair that the rates on the live animals and the product should be the same, that giving rebates to the one over the other to make them different in fact, would be an unjust and unreasonable discrimination; yet that was the condition confessedly for many years previous to March, 1902, when the practice was enjoined. Thereupon the actual rates were restored to the published rates, and so remained till the Great Western contract in August, 1902. Therefore, how can the fact that shipments were not affected by the publication of this lower rate on meat and products, August, 1902, as the lawful rate, render the discrimination or preference just and reasonable, when there was no difference in the new rate and amount previously paid? And of what importance can it be that the lower published rate to the packer did not "seem to directly influence or injure the shippers of live stock" when in truth no material change in the relative amount paid was made. The rate was old, the tariff was new, and the cost the same.

Again the Court found (Para. 8):

"That the welfare of the public, including the shippers, consumers and all localities and markets, does not seem to be materially affected by the present rates."

For the reasons just given no change in these particulars could result from the publication of rates to conform to that which the

actual rates had been; and if the Court by the term "present rates" meant the actual rates, those have not been materially changed; and if it meant the present published rates, they are not different to the previous actual relation of rates on these products.

These are substantially the only points of difference between the Court and the Commission, except that the Court held competition to be controlling and to justify the preference. It needs no argument to show that this difference is not due to a difference with respect to the actual facts, but to a "bent of mind." The Commission thought that the welfare of the public and the shippers was to be subserved by securing in these competitive articles an adjustment of rates which would permit the widest commerce in both, and not tend to extend it to the one and restrict it as to the other.

That the higher rates for the live stock and the lower rates for the packing house products and dressed meats has limited and does limit the extent of the commerce in the live stock and extended it in case of the packing house products and dressed meats, seems too plain for argument, in view of the admitted fact that they come in direct competition in the consuming markets of the country. The Commission invoked that principle of public policy to which it has steadfastly adhered as expressed by it in the Board of Trade and the Squires cases cited in its opinion, and reaffirmed in many cases, to-wit:

> "That the rates on raw materials shall not be greater than on the products of the material."

Elaborating which the Commission stated, quoting from the Board of Trade case:

> "A business like that, involving the preparation for and consumption of such a large and leading staple and necessary of life as meat, with all the competition that exists for it, is too large to be done in a corner."

After this quotation the Commission stated:

> "We think this dictum was true at the time the decision in that case was rendered, and is true now, and that the relations of rates on these highly competitive kinds of traffic should not be adjusted with reference to the interests of any particular market or markets. Rates

> relatively just and reasonable should be established, regardless of results that may ensue, and the live stock should be allowed to go where it will under such circumstances."

The Commission further noted that with the exception of the president of the Chicago Great Western Ry. Co., the officers of the several defendants "expressed the opinion that, as a general proposition the rates on the former traffic (live stock) should not be higher than on the lower, while some of them stated the rates on the manufactured product should be higher than on the raw material."

The Court in its ninth finding of fact said: "That the usual custom is for railroads to charge a higher rate for the finished product than for the raw material, and this rule has been applied to live stock and its finished products."

It seems illogical, therefore, that the Court should have found that the welfare of the public, including the shippers, consumers and all localities and markets, does not seem to be materially affected by the present rates, if the Court meant by that expression the present relation of rates between these commodities.

The Court having stated in its opening statement of the opinion that:

> "The Commission came to certain conclusions as to the facts that are fully set forth in their opinion in the case found in 10 I. C. C. R., 428, which findings of fact the Court assumed in the beginning of this hearing, and in his consideration of the case, to be the real facts in the case as required by statute."

It seems illogical that it should have reached exactly the opposite conclusion as to the main and essential fact as to whether the welfare of the public, shippers, consumers, localities and markets, were affected by the relation of rates involved in the controversy, and to have reached the ultimate conclusion as stated in the concluding paragraph of its opinion, that:

> "The evidence shows that in substantially all cases the factor of competition alone controls the rate. The Supreme Court in all cases has held that competition may be controlling. In only one case (Social Circle) has

> competition as a matter of fact been held not to make a defense to the charge of discrimination or undue preference. When all of the factors are considered together, the conclusion must be reached that the preference and the advantage in question is not undue or unjust, and Section 3 of the Interstate Commerce Act has not been violated. * * * Upon a consideration of all of the evidence, the Court holds that the prima facie case made by the findings of the Commission has been overcome by the evidence offered before the Court."

If we correctly interpret the Court's decision it was based upon the erroneous proposition of law that because there was competition for the dressed meat and packing house product which reduced the rate, therefore the defendants were justified in maintaining the live stock rates, and that to do so would not constitute an unjust or unreasonable preference, and that although the carriers might relieve the undue preference by reducing the live stock rate, they were not bound to do so unless competition for the live stock caused them to do it.

By the recent decision of this Court in Abilene Cotton Oil Co. vs. T. & P. Ry. Co., decided February 25, 1907 (Advance sheets, April 1, 1907, p. 350), the theory of the Act to Regulate Commerce is plainly set forth as requiring that the Commission shall in the first instance decide these matters pertaining to the proper standard of rates in order that there may be uniformity, and that at least the Court should have its best judgment upon the facts. The Commission is more than a mere referee; the Commission is an arm of the government to whose decision should be attached that importance which its position, skill and experience ought to command.

From the review which we have given of the evidence before the Court and the uncontroverted questions of fact, the conclusion is inevitable that in deciding the case the Circuit Court had no different state of facts from which to reach its conclusion, than had the Commission. The Court held, as we have above seen, that certain facts existed not found by the Commission, which needs no repetition here, but at the same time it did not base its decision upon those facts, but came to the conclusion, from the same state

of the case which the Commission considered, so far as material and controlling facts were concerned, that the Commission had not given proper effect to the fact of competition, which is a question of law. (See the Court's Conclusions of Law, Subdivision D.)

DISSIMILARITY UNDER THE LONG AND SHORT HAUL CLAUSE NOT APPLICABLE.

Section 3 of the Act to Regulate Commerce provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or *locality, or any particular description of traffic,* in any respect whatsoever, or to subject any particular person, company, firm, corporation, or *locality, or any particular description of traffic,* to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The Court in its opinion as to the law, Subdivision D, entirely misunderstood the contention of counsel for appellant, which it attempts to state, with respect to the application of the doctrine of competition as applied to the third section of the Act in respect to "a particular description of traffic." Our contention was and is that since Section 3 makes it unlawful to give an undue or unreasonable preference or advantage to a particular description of traffic as against another description of traffic, or to subject a particular description of traffic to an undue or unreasonable prejudice or disadvantage by reason of the preferences given to a competing description of traffic, that the statute declaring the act unlawful, involves as a major premise the proposition that in all such cases a dissimilarity of circumstances and conditions will always exist; and the same proposition precisely with respect to preferences and advantages as between localities. That from this it follows as a logical sequence that the fact of a dissimilarity between two classes of traffic, or a dissimilarity as to the transportation as between the two different classes of traffic, or the dissimilarity with respect to the transportation to or from the different localities, having the preference or which are subject to the disadvantage, can not justify the preference or advantage or make it due or reason-

able when otherwise it would not be so; for that would be to annul Section 3 of the Act declaring such preferences as to such dissimilar localities and dissimilar descriptons of traffic, unlawful.

And here is wherein the Court took an entirely erroneous view of the law and of the application of the exemption in the 4th section, because of dissimilar conditions, and held that the 3rd section was not violated in this case, because of the competition as to meats and packing house products which did not exist as to live stock. The decision was therefore upon a question of law and not of fact. It results that the 40th assignment of error complaining of the decree on this account is well taken.

NOTE:—The questions involved in the facts discussed and points presented in this brief relate alike in principle to the order of the Commission as to interior packing points and South St. Paul, which for convenience has been designated as St. Paul, hence it was deemed unnecessary to go into detail or discussion concerning the particular facts surrounding each of these localities. These interior packing points are on the direct lines from Missouri River to Chicago, and their rates for dressed meats and packing house products were reduced upon the same basis as the Missouri River rates substantially, and the preference is as great in all cases, and in most cases greater than from Missouri River. So of South St. Paul, the local rates on cattle and hogs to Chicago, which are a basis for rates from points for considerable distances on lines of railway between St. Paul and Chicago, on cattle and hogs to Chicago, and are very much higher proportionately than from Missouri River points to Chicago considering the distances, and the rates on the dressed meats and packing house products, which are lower than from Missouri River.

Furthermore, the Chicago Great Western contract does not apply as a condition to the traffic at St. Paul or interior packing points, nor were the conditions as to the matter of competition the same. But in as much as it is our contention that competition can not affect this case, that is not important. That contract and its effect is presented in another brief and not, therefore, referred to here, but it cannot be contended that it caused the existing relation of rates from the interior points or from St. Paul.

CONCLUSION.

Having reviewed the points at issue as developed by the evidence, we find that as to all matters which relate to the relative cost of the service in the transportation of fresh and dressed meats and packing house products on the one part, and cattle and hogs on the other, there was a controversy and extensive conflict in the opinion and expression of witnesses, but there was no disagreement on specific facts between the findings of the Court and those of the Commission; the only difference being that the Court found that it cost more to transport cattle and hogs, but did not treat that as controlling, while the Commission did not find which cost the most but found that the question was not controlling, and that the difference in the cost, whatever it might be, did not justify the discriminations found to exist. (See Para. V, Subdivision B.)

As to the relative earnings and profits the Court made no findings, but the Commission did find the earning per mile of gross tonnage hauled greater in the case of the live stock. (See Subdivision D, Para. V.)

Under said Subdivision D, and under the review of the evidence respecting the relative cost of the service in Para. V, Subdivision B, we have shown that the profits and net earnings are greater in the case of the transportation of the cattle and hogs than in the case of dressed meats and packing house products.

The remaining questions are: The commercial relation of the two classes of commodities, which is presented in Para. VI, herein, and the facts relating to competition and its effect, presented in Para. VII. We have shown that there is no dispute with respect to the facts in these matters, except the conclusion with respect to the effect of the higher rates on live stock upon the shippers; upon Chicago as a market; upon the Chicago Live Stock Exchange, and its effect upon the welfare of the public. As to these matters the Court held that there was no material effect on account of the rates complained of, but as we have shown the preferences and discriminations had existed for years in the form of rebates, and later in the published tariffs, and that the Court was not justified in reaching the conclusion that the disparity in the rates does not affect the shippers and localities mentioned or the welfare of the public. The effect has been a part of the history of these rates

and the traffic covering a period of years, during which time a confessedly great change has taken place.

The Court in its final conclusion holds the preference is not to be undue or unreasonable, or the prejudice or disadvantage undue or unreasonable, and that there is no violation of the third section of the Act, as found by the Commission, which is a mere conclusion of the Court upon substantially the same facts upon which the Commission based its conclusion. Thus the Court set up its judgment against the trained and skilled judgment of the Commission in a case where there is no dispute on the material and controlling question of fact; and in which the Court disagrees with the Commission because it holds that the Commission did not give effect to the fact of competition, which the Court holds to be controlling. It is true, the Court holds the prima facie case made was overcome, but there is no showing that the Commission found a single fact erroneously. Should not the Court have pointed out the facts found by the Commission which was overcome by evidence before the Court? The decree was entered dismissing the bill on entirely a different ground, viz: the effect of competition.

The appellant submits that the decree was erroneous for the reasons hereinbefore submitted, and as set forth in the assignments of error, and prays the Court to reverse the decree and direct the Circuit Court to make such decree as in equity it should have made.

Respectfully submitted,

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Solicitor for the Appellant.

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Of Counsel.

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Assistant Attorney General.

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Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

No. [redacted] 73.

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR INTERVENOR, T. M. SINCLAIR & COMPANY, LIMITED.

BY CHARLES A. CLARK

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1906.

No. 325.

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR INTERVENOR, T. M. SINCLAIR & COMPANY, LIMITED.

THE FACTS AS TO THIS INTERVENOR.

This intervenor, an Iowa corporation, together with its predecessors in interest, has long been engaged in packing cattle and hogs, principally hogs, at Cedar Rapids, Iowa, a town of about 30,000 people. The investment in its plant is more than $1,000,000; it slaughters about 600,000 hogs annually; the annual miscellaneous tonnage into its plant, exclusive of hogs for slaughter, is 100,000,000 pounds; the tonnage out of its cured meats and products, is about the same. On an average its business requires 800 to 900 employees, giving support to a population of from 2,500 to 3,000 people. (Record, 597-8, 617, 618.)

It purchases hogs principally in the State of Iowa, sometimes at

Sioux City, St. Joseph, and occasionally at Chillicothe, Mo., and south from Kansas City. The purchases outside of Iowa are exceptional. The local freight rates in Iowa are controlled by the Iowa Distance Tariff, promulgated by the Iowa Railroad Commission. (Record, 598-9.)

The interest of this intervenor in this proceeding in questions involved is this:

The average freight rate on live hogs into its packing house is 11 cents per hundred; the rate on its finished product from the packing house to Chicago is 13½ cents per hundred; making a total of 24½ cents from the point of origin of the live animal to the Chicago market for the finished product. (Record, 600.)

On the other hand, the average rate on live hogs from Iowa to Chicago is 20 to 21 cents per hundred (Record, 603), giving the Chicago packer an advantage of from 3½ to 4½ cents per hundred (Record, 600, 603, 604), for it requires no additional shipment of his product in order to market it.

If the average rate on live hogs from Iowa points to Chicago is reduced 3 to 5 cents per hundred, it will give the Chicago packer just that much additional advantage over the local packers in Iowa. (Record, 605.) Raising the rates on cured meats and other packing-house products would obviously have the same effect; nor would that effect be different if the rate on live animals was reduced in part and the rate on packing-house products raised in part. Yet the the order of the Interstate Commerce Commission in controversy, if put into force, will have one or the other of these effects.

The annual hog census of Iowa is about 10,000,000 animals, of which about 1,500,000 are slaughtered in Iowa. (Record, 602.) Practically the entire balance goes to the Chicago market. (Record, 615.) It cannot be claimed, therefore, that Chicago as a locality is discriminated against by the freight rates in force so that it does not get its share of the Iowa hog crop. There are no complaints of the freight rates in force, from the producers and shippers of live animals. (Record, 612.)

Thirty-five per cent. of the product of this intervenor's packing

house is sold in Chicago, or on a basis of local freight rates from Cedar Rapids to Chicago. The balance of its product, or 65 per cent., goes to export trade. (Record, 605.)

The foregoing facts are from the testimony of E. T. Koch, traffic manager of the Cedar Rapids packing house for many years, and are not called in question by the testimony of any other witness.

The result of these conditions is that a change in freight rates such as is called for by the order of the Interstate Commerce Commission would give the Chicago packer a further advantage of 5 cents per hundred over the interior packers of Iowa, and would seriously cripple and cut down their business, if it did not ruin them and drive them out of the field.

As to hogs purchased by this intervenor at Missouri River points, the case is worse. The lowest rates from those points to Cedar Rapids is 15 cents (Record, 600); the average is 16 to 17 cents. (Record, 608.) The local rate from Missouri River points to Chicago is 23½ cents, but by means of through billing the Chicago packers secure the great bulk of their hogs from Missouri River points, and beyond, at 16 to 18 cents per hundred. The case, therefore, stands thus:

Missouri River to Cedar Rapids	17 cents
Finished product, Cedar Rapids to Chicago	13½ "
Total	30½ "
Local rate from Missouri River to Chicago	23½ "
Difference in favor of Chicago	7 "
The freight cost to Cedar Rapids packer as above	30½ "
Hogs from Missouri River on through billing	18 "
Difference in favor of Chicago	12½ "

These facts are supplemented by the following findings of fact by the court below, which cannot be seriously drawn in question:

> "First. That the live stock rates are reasonable in themselves . . . the average Iowa rate is twenty-one cents.

The great weight of evidence indicates that these rates are at least reasonably low.

"Second. That the cost of carrying live stock is greater than that of carrying dressed meat and packing house products.

"Fourth. That the rates in question given to the packers at Missouri river and St. Paul, were the result of competition. . . . There was not competition enough at said points to lower the rate as to live stock. . . .

"Fifth. That the competition in question did not result from agreement of the defendants, but was actual genuine competition.

"Sixth. That the persent rates have not materially affected any of the markets, prices or shipments; that they are reasonably fair to Chicago and to the shippers; that the shipments of live stock from points between Chicago and the Missouri river and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of the live stock comes to Chicago from points as near as 150 miles this side of the Missouri river and St. Paul, and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock.

"Seventh. That the rates for carrying packers' products and dressed meats were remunerative. . . .

"Eighth. That the welfare of the public, including the shippers, consumers and all localities and markets, does not seem to be materially affected by the present rates.

"Ninth. . . . There are many commodities where the raw material is charged more for carriage than its finished product. . . . For sixteen years out of twenty-three, between Missouri river points and St. Paul and Chicago, the published rates on live stock were higher than on dressed meats and packing house products."

(See opinion of Judge Bethea, Record, 176-7.)

The cause was tried in the court below on oral testimony. That court saw and heard the witnesses on both sides, observed their appearance and demeanor, and was much better fitted to judge of the weight and effect of their evidence than it could have been from reading the enormous record.

Its findings of fact are entitled to additional weight for that reason.

BRIEF.

I.

Findings of Fact by Court Below.

In an equity suit findings of fact by the Chancellor or a Master are, on appeal, "to be taken as presumptively correct, and, unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence," such findings will be upheld.

Crawford v. *Neal,* 144 U. S., 596.
Barnett v. *Denison,* 145 U. S., 134.
Tilghman v. *Proctor,* 125 U. S., 136.
Kimberly v. *Arms,* 129 U. S., 512.
Evans v. *Bank,* 141 U. S., 107.
Callaghan v. *Myers,* 128 U. S., 666.
Towson v. *Moore,* 173 U. S., 24.

The United States Circuit Courts of Appeals apply the same rule to special findings of fact by the Chancellor, which is applied to the findings of a Master in Chancery, and this is obviously correct.

Snyder v. *Dobson* (8th Circuit), 221 C. C. A., 77, and cases there cited.
Metropolitan Bank v. *Rogers,* 3 U. S. App., 406.

Where the parties and witnesses are before the trial court and the testimony is given orally, this is an additional circumstance of weight in support of special findings of fact by such court.

Wilson v. *Cattle Co.,* 129 Iowa, 20.
Wilcox v. *Swecker,* 129 Iowa, 153.
Trow v. *Berry,* 113 Mass., 148.
Richards v. *Todd,* 127 Mass., 172.

II.

Judicial Notice.

The court will take judicial notice of general and well-known business conditions and usages.

Gibson v. *Stevens*, 8 How., 399.
N. Y. Indians v. *United States*, 170 U. S., 42.
Ohio & Co. v. *Bebolt*, 16 How., 435.
Whitney v. *U. S.*, 167 U. S., 546.
Bank v. *Adams Ex. Co.*, 93 U. S., 185.
Nicol v. *Ames*, 173 U. S., 517.

III.

The Chicago Great Western Railway Contract for Packing House Products.

This contract is found by the court below to have been the result of lawful competition. It can not be annulled or declared void in this suit. There is, as to this, a defect of indispensable parties, viz., the packing houses who are entitled to the benefit of the contract.

Coiron v. *Millaudon*, 10 How., 113.
Caldwell v. *Taggart*, 4 Peters, 190.
Morgan v. *Morgan*, 2 Wheat., 298.
Williams v. *Bankhead*, 19 Wall., 563.
Finlay v. *Bank*, 11 Wheat., 304.
Riddell v. *Mandebille*, 5 Cranch., 322.
Russell v. *Clark*, 7 Cranch., 64.
Connecticut v. *Penn.*, 5 Wheat., 524.
Barney v. *Wall*, 6 Wall., 280.
Bank v. *Carrollton*, 11 Wall., 624.
Traders' Bank v. *Campbell*, 14 Wall., 87.
Ribon v. *Ry. Co.*, 16 Wall., 446.

IV.

No Substantial Injury Shown.

No substantial injury is shown as to the producer and shipper of live animals; none as to the Chicago packer; none as to Chicago as a locality; none as to live animals as a commodity. See sixth, seventh and eighth findings of court below. (Record, 176-7.) The question as to railroad rates on raw material as against rates on the finished product is purely a moot question. This court does not sit to decide moot questions. The mere potentiality of an injury is not enough to induce its action.

Waite v. *Dowley*, 94 U. S., 534.
Williams v. *Hagood*, 98 U. S., 75.
Marye v. *Parsons*, 114 U. S., 330.
Mills v. *Green*, 159 U. S., 653.
Kimball v. *Kimball*, 174 U. S., 161.
Chicago &c. Ry. Co. v. *Denver &c. Ry. Co.*, 143 U. S., 620.
California v. *Railroad*, 149 U. S., 314.

ARGUMENT.

I.

Present Rates Are Fixed by Competition.

It is not designed on behalf of this intervenor to do more than briefly present the questions which directly and immediatly affect its interests and business success or existence. It must have reasonable rates as compared with its competitors in the great packing centers, or it must go out of business, and the city of its location must lose an important industry on which its prosperity depends to a very considerable degree. Its interests are in common with the railroads only to the extent that they deal fairly and justly by it. It is unwilling, however, to be made the victim of a crucifixion even with the railroads as side ornaments. In this proceeding it is struggling for the right of existence and nothing else.

The present rates under which it is able to do a fairly successful and prosperous business are the result of competition among the railroads, and not of any combination between themselves, or between themselves and packers west of Chicago, to deliberately discriminate against Chicago or Chicago packers, or as to the two classes of commerce covered by the bill of complaint. This is established by the facts specially found by the learned court below, and set forth, *supra*.

These facts are, as this court has said, opinion by Mr. Chief Justice Fuller, "to be taken as presumptively correct; and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence," they are to be upheld.

Crawford v. *Neal*, 144 U. S., 596, and cases cited Division I of brief, *supra*.

It is respectfully submitted that not one of them has been or can be successfully impeached or attacked by appellant.

Many peculiar circumstances enter into and complicate the rates drawn in question, and the question as a first proposition is a practical one, to be solved by the railway from a purely practical standpoint. They cannot control the circumstances; they are largely controlled by the circumstances. When they have taken action and fixed the rates as to commerce for which there is fierce competition, and there is no impeachment of their honesty and good faith as there is none in this case, that practical solution of nice and difficult questions ought to stand unless it involves a violation of the Interstate Commerce Act, which is clear, palpable, and undeniable. Furthermore, the resulting injury to complaining interests should be real, substantial and serious; a merely theoretical or argumentative or potential injury is not sufficient ground for substituting the honest judgment of the Interstate Commerce Commission without practical experience or knowledge, or the honest judgment of the courts without practical experience or knowledge, for the honest judgment of railways with the fullest practical experience and

knowledge. They are, moreover, literally compelled to deal with a pressing and insistent problem, involving not only their own interests, but the interests of their patrons, of the vast industries and investments of their patrons, and of thousands of people directly dependent upon these industries, as well as of many cities and towns and of large populations whose prosperity will be materially affected by their just and wise, or arbitrary and oppressive action, as the case may be. To ask the courts to interfere with established rates which in all substantial particulars deal fairly with these vast interests, which have stood for many years, neither discriminating intentionally or substantially in favor of any interest or point, nor intentionally or substantially against any interest or point, and under which Chicago packers as well as the Missouri River, St. Paul and interior packers of Iowa have all prospered and are prospering, is a startling appeal indeed. So far as the packers are concerned there is no real grievance. The Chicago packers undoubtedly have some advantage as to rates over the interior packers of Iowa, but other circumstances which no court can interfere with or affect afford the interior packer fair remuneration on his capital, and he can live. Shall the courts intervene and establish conditions under which he cannot live, or only survive in a crippled and ineffective state instead of the active and vigorous factor which he now is? There is surely no ground shown, so far as Chicago packers are concerned, requiring this court to intervene in such vast and complicated interests, and in circumstances so complicated, diverse, delicate and difficult to deal with. If it were otherwise the Chicago packers would be the active complaining and prosecuting interest in this proceeding, waging active and open war for their own existence, instead of the prosecution being carried on by commission men who want to make more money by selling more hogs and cattle to the Chicago packers.

Nor can this court in any manner control the circumstances which have fixed existing rates. It cannot lay the weight of its little finger upon one of these circumstances either direct and palpable, or involved, remote and indirect. These will remain and will still press for solution with steady and dynamic force. That solution must

come along the line of least resistance. A court can no more lay down the law for such circumstances than it can for the mighty flood of the Mississippi river. If the railways have diverted their natural course to the injury of others they may be put back in their natural channel and directed along their natural line. That it is apprehended is what is meant when the Interstate Commerce Act gives full force to "circumstances" in the fixing of rates. The carriers and the courts are alike subservient to them, and not masters over them.

> "Any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."
>
> *Interstate Com. Commiss.* v. *B. & O. Ry.*, 145 U. S., 284.

If we turn from packers to places, no just ground of complaint on behalf of Chicago is shown. It ought to have its rights, but it is not entitled to all the rights there are. Iowa and Iowa cities have some rights in their own products and the manufacture thereof. Chicago is in like manner entitled to rates which will give it hogs for packing—but not all the hogs of the West and Northwest. Iowa is entitled to some of those she grows, and when Chicago gets from 65 to 70 per cent. of the Iowa hog crop, it gets enough, and more than enough.

And what of the oppressed commission man who is back of the complaint in this suit? No doubt if interior packers of Iowa can be broken up and eliminated, he will earn a commission on more Iowa hogs. But is *he* entitled to overturn existing conditions of prosperity for all, and exterminate Iowa industries, to the end that he shall have everything and Iowa nothing? The increase of his revenue will hardly induce the court to make the order prayed for. It is the settled policy of this country to build up local industries. The railways have been praiseworthy in respecting this policy, and in carrying it out. Congress surely never intended to interfere with this wise policy in enacting the Interstate Commerce Act. What it did intend to do was to prevent the building up of some great cities and some great manufacturers at the expense of the country at large and to give local industries a fair chance. The local industries in-

volved in this litigation get nothing more than a fair chance now—hardly that. If the law is to be so administered, where no palpable and intentional discrimination is shown, as to crush them out, instead of having more railway regulation we will very soon have less. It is vain and idle to suppose that the great State of Iowa will see its present industries killed by railroad regulation, and call for any more medicine of that kind. Its industries are not asking to be built up by discriminations in their favor, but they have a very robust belief that there ought not to be further discrimination against them.

II.

The Producer and Shipper.

It may be argued that the Iowa producer and shipper is discriminated against by the present rates on live animals. That question, obviously, cannot be determined by looking at the rates on the finished products of the packing house. These finished products are not commerce or freight of the same type as the live animals, but they are competitive freight with the live animals, as wheat and corn and lumber and iron are competitive freight so far as rates are concerned. Each article and class of commerce seeks the best rate possible. Competition is one very potent factor in determining what that rate shall be. It is quite impossible to say that the rates on live animals are too high merely by comparison with rates on lumber and iron, or corn and wheat, mere dead and inert matter; and it is equally impossible to arrive at the same conclusion by mere comparison with rates on finished packing-house products.

It is undeniable that the competition among railways is active, continuous and intense for the carriage of live animals, and when rates are fixed under the pressure of such sharp competition, the presumption must be that they are reasonable, especially when they have remained in force unquestioned by direct proceedings on the part of shippers and producers to test their fairness. Under these circumstances this intervenor does not understand that there is any

clear showing that the rates on live animals are unreasonable in and of themselves. Indeed, it is hardly to be believed that Iowa producers and shippers would have supinely submitted to such unjust and extortionate rates until the commission men of Chicago discovered their grievances, and intervened to protect them and set them right. Usually the commission men have given them "such protection as vultures give to lambs, covering and devouring them."

In the absence of clear proof, it is assumed that the courts will not intervene upon the ground that the rates on live animals are too high.

In fact, the real gravamen of complaint is that the rates on cured meats are too low. If the bill is sustained upon this ground it will not avail producers, for these rates must presumably go up, rather than the rates on live animals come down. An order which indirectly coerces raising the rates on dressed and cured meats would be startling. Was the object of the Interstate Commerce Act to raise on the necessities of life the freight rates as established among the railway companies under the pressure of competition, and thus to increase the cost of meats or other foods to every consumer in the land? Or does anybody imagine that the Chicago packer would put down the price of meats sufficiently to cover the rise in freight rates? An order having this effect would inflict a great injury upon the consumer, while it would in no manner benefit the producer. Probably nobody connected with this litigation anticipates any benefit to the producer. When the situation is analyzed, it seems clear that while interior packers may be injured, and Chicago packers may be discriminated in favor of, and Chicago commission men given more revenue, yet consumers will suffer and producers will not gain.

The effect, however, on the interior packers, whether the rates on cured meats are raised, or the rates on live animals lowered, or the two rates changed to an intermediate point, will be the same. That is like the negro's coon-trap, "set to catch them when they are coming as well as when they are going."

III.

Collateral Questions.

1. *Seaboard Rates.*—Some attempt was made by the learned counsel for the Government on the cross-examination of Mr. Koch to show that intervenor has an advantage over Chicago packers on export meats. The figures elicited stand as follows:

Rates on finished product Cedar Rapids to Seaboard	39	cents.
Average rate on hogs into Cedar Rapids packing house	11	"
Total	50	"
On finished product Chicago to Seaboard	30	"
Average rate on Iowa hogs into Chicago	21	"
Total	51	"

Showing an apparent advantage in favor of Cedar Rapids packers on export meats of 1 cent per hundred pounds.

Concede that this advantage actually exists, although Mr. Koch's testimony is that 21 cents is a high average rate on Iowa hogs to Chicago, and that this average is nearer 20 than 21 cents. Still the difference of 1 cent per hundred in favor of the Cedar Rapids packer as to this class of cured meats is evidently too inconsiderable to affect general results. The admitted prosperity of the Chicago packer shows this.

Furthermore, the question is a purely collateral one, and cannot in any just sense enter into the controversy over the rates actually drawn in question by the bill exhibited in this litigation. Otherwise, to arrive at a determination of the real question in issue, it would be material to consider all rates on live hogs purchased by Chicago packers outside of Iowa, especially in Illinois. The rates on live hogs for Chicago from Missouri River points shown to go, by means of through billing, at from 16 to 18 cents per hundred, or 5 to 3 cents cheaper than the Iowa rates; also the local rates on all finished products out of Chicago packing houses, as well as the local rates on all finished products out of the Cedar Rapids packing house,

and from this vast mass of details strike a balance and determine where the ultimate and final advantage lies.

To this might be added local conditions, including labor, the cost of coal, salt, and other miscellaneous tonnage into the packing houses, which enter into the final cost of the finished product. Obviously the line of reasoning adopted by the Government as to rates on export meats is therefore fallacious. It is purely collateral matter, which if gone into with other collateral matter of like nature, would involve the court in a morass of details in which the issue tendered would be lost sight of, and as to which no satisfactory conclusion could be arrived at in any event.

So as to special illustrations on export meats from other points than Cedar Rapids. These are clearly collateral and confusing. If, indeed, we take live hogs from Missouri River points going to Chicago by means of through billing at 16 to 18 cents per hundred, this would make the total export rate for the Chicago packer from 46 to 48 cents as against 50 cents for the Cedar Rapids packer; and it is certain that very heavy shipments of hogs from the Missouri River go through to Chicago at the above-mentioned rate.

But the real controversy is, as to this intervenor, the relative rate at which the interior packer of Iowa can reach Chicago with his finished product, as against the rate of the Chicago packer on the same product. If they meet there, in the hog and pork market of the world, with no advantage to the Iowa packer, the court may safely leave them there so far as the alleged discrimination charged in this proceeding is concerned. The Chicago packer, on his own ground, will certainly take care of himself. If the interior packer of Iowa cannot do so, when the rates into Chicago are fairly adjusted as to him, then it is his fault in going to Chicago, and he must "seek fresh fields and pastures new." Prior to the present adjustment, he was absolutely shut out of Chicago, as shown by the testimony of Mr. Koch in no manner contradicted, by a combination of rates which were nothing less than prohibitory. (Record, 614.) It can serve no public interest, or good purpose, to restore that condition, as it is sought to do by this suit.

2. *Shrinkage in Curing.*—It is shown that there is a net shrinkage of 12 per centum in slaughtering *and curing* the live hog. The gross shrinkage of 30 per cent. in slaughtering is not the true test. Of course the Chicago packer pays a higher freight rate on this lost and eliminated matter than the interior packer of Iowa. This view is purely collateral, inhering in local conditions, and may well be left to take care of itself in considering the question of discrimination against the Chicago packer. It may safely be assumed that on live hogs for Chicago where the freight is less than 21 cents, the average rate on Iowa hogs, the Chicago packer gets sufficient advantage to wholly recoup himself over the interior Iowa packer as to freight on this 12 per cent. shrinkage. Take, for instance, the hogs from Missouri River points which he receives at 16 and 18 cents per hundred; there his finished product will stand at that figure, as against the finished product of the Iowa interior packer at 24½ cents per hundred. So of all hogs purchased in Illinois and elsewhere where the rate into Chicago on the live animal is less than 21 cents. The matter is not serious in any aspect.

While twelve per centum of the freight rate on Iowa hogs is lost by the Chicago packer, the same percentage of the smaller freight rate is lost by the Cedar Rapids packer. The test by figures is this:

The Chicago packer, .21x.12=.02,52 freight on shrinkage.
Cedar Rapids packer, .11x.12=.01,32 freight on shrinkage.

Balance against Chicago packer, .01,2

A difference, in other words, of only one cent and two mills per hundred against the Chicago packer, which difference, it may be safely assumed, does not exist at all, taking the entire output of packing house products at Chicago. Furthermore, this difference in a collateral matter, if it did exist, like the difference in the other collateral question of export meats, must be more than counterbalanced by the enhanced cost to the Cedar Rapids packer on the miscellaneous tonnage into his packing house, which equals, as shown by the testimony of Mr. Koch, his tonnage on the output of

finished product, as compared with freight paid by the Chicago packer on the same miscellaneous tonnage for his packing house. It requires no proof that this miscellaneous tonnage enters into the finished product in both cases. It can have no other conceivable purpose. It must include salt for curing meats, iron, lumber, glass, etc., for packages, with other matters of like character. Nor does it require proof that freight rates to Cedar Rapids on this miscellaneous tonnage taken as a whole are much higher than freight rates on the same into Chicago. That is a matter of general notoriety in commercial affairs, of which the court should take judicial notice.

Gibson v. *Stevens*, 8 How., 399, and cases *infra*, p. 6.

Thus we have abundant illustrations of how one collateral matter of this character counterbalances another if we enter upon that field, and a clear showing of the utter futility of assuming to determine the real issue upon considerations of this character.

3. *The Chicago Great Western Contract.*—It seems to be *assumed* by the learned counsel for the Government, in spite of the express finding to the contrary by the court below, that the Chicago Great Western Railway contract for carrying packing house products from Missouri river points to Chicago, and not competition, is what fixes the rates complained of on packing house products. Upon this theory it is further assumed that such contract may be assailed in this proceeding, rather by collateral suggestion than collateral attack.

It is clear that no decree can be rendered in this case which will bind the parties to that contract. If a direct collateral attack were made upon it and by the bill itself, as to this it would clearly fall within the familiar principle of equity practice, of the absence of an indispensable party without whose presence the court could not proceed.

Coiron v. *Millaudon*, 10 How., 113.
Caldwell v. *Taggart*, 4 Peters, 190.
Morgan v. *Morgan*, 2 Wheat., 298.
Williams v. *Bankhead*, 19 Wall., 563.

Finlay v. *Bank*, 11 Wheat., 304.
Riddell v. *Mandeville*, 5 Cranch., 322.
Russell v. *Clark*, 7 Cranch., 64.
Connecticut v. *Penn.*, 5 Wheat., 524.
Barney v. *Wall*, 6 Wall., 280.
Bank v. *Carrollton*, 11 Wall., 624.
Traders' Bank v. *Campbell*, 14 Wall., 87.
Ribon v. *Ry. Co.*, 16 Wall., 446.

The other party or parties to the contract are so clearly necessary in passing upon it, that the bill as to this would be dismissed on demurrer under the above decisions, and many others which might be cited. The Government can hardly escape the operation of this rule by proving the contract itself, and then attacking it by collateral suggestion. That seems too clear for argument. If this court should declare the contract void, nobody would be bound in subsequent litigation over it.

Under such a declaration by this court, enjoining the Railway Company in effect from carrying the contract out, if that company obeyed the mandate and thus broke its contract, on a suit for damages against it for such breach, it could not successfully plead the action of this court as a defense. The question would still remain for determination regardless of what this court declared outside of the pleadings and in the absence of an indispensable party. That means a party *to the bill*, where a distinct issue is framed as to the contract, and issue taken thereon. If, for instance, the Chicago Great Western were the only party defendant, and it pleaded its contract as to packing house products, and the absence of an indispensable party, this court never could proceed to overturn that contract and coerce new rates as to the parties to it, without having them brought in and giving them their day in court. The fact that there are other defendatns does not change this plain proposition and principle.

But concede for the argument that the question may be raised and passed upon in this case. The contract could have come from

nothing but competition. And see fourth and fifth findings of Judge Bethea. If the Chicago Great Western had been the only line at the points covered by the contract, having the packers at its mercy, it may as well be conceded on both sides that so low a rate would not have been made. And it may safely be assumed, under the actual conditions shown, that what competition did at a jump by this contract, it would have done by like reduction of rates without the contract. Under the same sharp competition, and other like conditions, the same causes would have inevitably produced the same effect in different form. Do the courts sit, then, to abolish competition, and deprive, not only shippers, but the great mass of consumers of the benefit of it, or was that the object of the Interstate Commerce Act? Competition is not against public policy; it is highly in the interest of a sound public policy and favored by it. Does public policy forbid competition, lawful and desirable in itself, because moving along lawful lines, and by lawful steps, it establishes rates which are relatively lower on one article of commerce than on another competitive article? As to the competitive article, the most that can be said is that it suffers from the lawful result of a lawful and indispensable factor in commerce, taking lawful steps one after another. Such injury is purely consequential, therefore, resulting from what is strictly lawful and not only lawful but highly beneficial to the people and the public. No action of any kind was ever yet maintained in any court for such consequential injury. It is *damnum absque injuria*. This is so as to places and packers no less than as to the article of commerce itself. Competition will ultimately regulate the slight inequalities complained of if they exist, which as to this intervenor is not made out. The railway defendants have no interest in injuring Chicago; they are all deeply interested in that city. It is far safer to leave competition to do its work, than to project a foreign body, either commission or court, into that domain, the indirect effect of whose orders must be vastly greater, and vastly more far-reaching, than their direct effect upon a matter where no substantial grievance is shown. The increase of rates on cured meats, for instance, as already pointed out,

will injuriously affect all consumers; it will not help the producer of hogs and cattle. It may aid the Chicago packer to kill his competitors, and thus deprive Iowa of that industry and put the public at large at his mercy. But does public policy require the court to go that far in abrogating contracts or rates, lawful in themselves, because their consequential effect, in a vast field, is a possible injury (no stronger term can be used), to some interest, place, corporation, or individual? If so, the best club ever turned out will be placed at once in the hands of the opponents of railway regulation.

IV.

Raw Material and Finished Product.

It is not the intention on behalf of this intervenor to discuss at length the abstract question as to the relative freight rate which should be charged against raw material as compared with the finished product. It will be assumed that the relative rates involved in this case may be safely left where they are, a matter of vital concern in working out practical results. There is as fierce competition among the railways for the raw material as for the finished product so far as live animals and packing-house products are concerned.

On its face the proposition is in the last degree improbable that the railway defendants will fix these relative rates, so that they will divert cattle and hogs from Chicago for the purpose of securing the *smaller* tonnage of the interior packers of Iowa, or the packers west and northwest of Chicago in general; or that they will injure the producer of hogs and cattle, the larger tonnage, by charging them a rate too high, and charging the packers with smaller tonnage, a rate too low. It is the experience in all business affairs that the larger customer receives special consideration if anybody gets it.

Starting from this point, it is again submitted that the Government has not made out a clear or satisfactory showing that the rate on live animals is too high, or the rate on the finished product is too low. The findings of Judge Bethea on this behalf are not successfully attacked. And these matters ought not to be left to conjecture

when it is proposed to control by judicial decree the vast interests involved in the litigation at bar.

More than this; it has already been pointed out that no interest has been shown to suffer a substantial injury from existing rates. (See findings of court below.) As to the raiser of hogs and cattle, it is not conceivable that he will be benefited by raising the rates on dressed meats. Indeed he is not a party to this litigation, and all that is said concerning his rights or interests is collateral matter simply illustrating the situation of the real parties.

It is not of course denied that the Government, in a sense, represents all interests embraced in the interstate commerce questions in controversy, but none the less the producer is not an active factor on either side of the issues.

As no substantial injury is in fact shown, and the court below expressly so found, the question as to relative rates on raw material as against the finished products, is purely a moot question. The Federal Courts do not sit to decide such moot questions where there is not a real and substantial present and existing injury shown. The mere potentiality of an injury is not enough to set their machinery in motion.

Waite v. *Dowley*, 94 U. S., 534.
Williams v. *Hagood*, 98 U. S., 75.
Marye v. *Parsons*, 114 U. S., 330.
Mills v. *Green*, 159 U. S., 653.
Kimball v. *Kimball*, 174 U. S., 161.
Chicago &c. Ry. Co. v. *Denver &c. Ry. Co.*, 143 U. S., 620.
California v. *Railroad*, 149 U. S., 314.

Whether one type of this commerce, therefore, ought to bear a higher rate, or as high a rate as the other type, does not present itself for judicial determination and solution. Whatever the court may think on that question as an abstract proposition, it will be time to formulate a decree based thereon when a grievance which ought to be remedied is shown.

It may be remarked that the same question is involved in the

milling in transit rate which has stood unquestioned for many years. Under that rate wheat is shipped into the great mills of Minneapolis, manufactured into flour, and sent on to Chicago at one through rate, viz., the rate from the point of original shipment of the wheat to Chicago, or other point where the flour is delivered.

So far as the interior packer of Iowa is concerned the present rates approximate in principle the milling in transit rates. Mr. Koch testified that he was careful to see that each railway got the same per cent. of tonnage of the finished product, as the per cent. of the total tonnage on live animals it shipped into the packing house.

This court will undoubtedly take judicial notice of the milling in transit rates which have been so long in force and are a matter of general notoriety.

Gibson v. *Stevens*, 8 How., 399.
New York Indians v. *United States*, 170 U. S., 42.
Ohio & Co. v. *Bebolt*, 16 How., 435.
Whitney v. *U. S.*, 167 U. S., 546.
Bank v. *Adams Ex. Co.*, 93 U. S., 185.
Nicol v. *Ames*, 173 U. S., 517.

When the Government shall have succeeded, therefore, in establishing its contention in this case as to rates on finished products and raw material, it will have a far better case against the milling in transit rates. What the effect of overturning those rates as an illegal discrimination under the Interstate Commerce Act will be, both upon the milling industries of Minnesota, and of every mill west of Chicago, as well as upon the flour consumers of the whole country, will be readily apprehended by the court without enlargement in argument.

The results sought to be accomplished in this suit are too stupendous and too far-reaching in their general injurious effect upon the public, to be undertaken by any court except under the stress of a correspondingly great public injury, necessity and duty, none of which have been established or made out.

Finally it is submitted that if the State of Iowa cannot manufac-

ture its own raw material, it cannot manufacture anything. This intervenor feels that the courts will hesitate long before they take from Iowa the facilities and opportunities for slaughtering and packing 35 per centum of its own hogs.

Respectfully submitted,

CHAS. A. CLARK.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 73.

INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL., RESPONDENTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF RESPONDENT CHICAGO GREAT WESTERN RAILWAY COMPANY.

CORDENIO A. SEVERANCE,
FRANK B. KELLOGG,
ROBERT E. OLDS,
Solicitors for Respondent Chicago Great Western Ry. Co.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 26152

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 352.

INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL., RESPONDENTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF RESPONDENT CHICAGO GREAT WESTERN RAILWAY COMPANY.

Preliminary Statement.

In the analysis of the testimony, which we print separately and file herewith, we have shown that the findings of fact made by the trial court are amply justified by the evidence. This brief will be devoted to a consideration of such questions of law as we conceive to arise upon the facts thus determined, and it will not be here necessary to advert, except in a most general way, to the evidence. As stated

at the conclusion of our analysis of the testimony, we believe that if the findings of fact are correct, the decree of the court below must be affirmed. There are, however, certain legal propositions applicable to the facts, and to these we desire to direct attention.

I.

FINDINGS OF FACT BY THE CIRCUIT COURT IN A CASE WHERE THE WITNESSES WERE PRODUCED AND GAVE THEIR TESTIMONY IN THE PRESENCE OF THE COURT ARE PRESUMPTIVELY CORRECT, AND ITS VIEW SHOULD BE ACCEPTED UPON APPEAL, UNLESS IT CLEARLY APPEARS THAT IT ERRED AS TO THE EFFECT OF THE EVIDENCE.

The circuit court in this case had the same opportunity of observing the demeanor of the witnesses and their apparent candor or lack of candor in testifying that a master has in an ordinary case referred to a master to report conclusions. We have shown in our analysis of the testimony that the findings are well supported by the evidence. The great weight of the testimony upon all important questions in the case is with the respondent. It is clear that the conclusions of the trial court upon the facts should not be set aside.

Halsell v. Renfrow, 202 U. S., 291.
Shappiro v. Goldberg, 192 U. S., 240.
Byer v. Le Fevre, 186 U. S., 119.
Stuart v. Hayden, 169 U. S., 14.
Warren v. Keep, 155 U. S., 267.
Crawford v. Neal, 144 U. S., 596.
Evans v. Bank, 141 U. S., 107.

II.

THE CONTRACT ENTERED INTO BY THE RESPONDENT CHICAGO GREAT WESTERN RAILWAY COMPANY WAS A PROPER EXERCISE OF ITS RIGHT TO COMPETE FOR BUSINESS.

At pages 61 *et seq.* of the Analysis of the Testimony we have directed attention to the contract made in August, 1902, between the Chicago Great Western Railway Company and the various packers doing business at Missouri River points, and have called attention to the circumstances under which the same was made and the conditions that justified the contract.

The first feature to take into consideration in connection with this contract is that it did not mark the beginning of competition among the respondents for the business of hauling packing-house products. It was itself an act of competition on the part of the Chicago Great Western Railway Company. For years prior to the time when it was made, the field had been fiercely competitive, so much so that unlawful methods had been resorted to generally by the various roads interested for the purpose of getting the business. A vicious system of giving rebates had grown up and had been dealt with by the writ of injunction. About the time that the contract was entered into, this respondent, operating as it did the longest line between Missouri River points and Chicago, came to the conclusion that it was not securing its just share of the business, and accordingly adopted the most proper and legitimate means within its power to get it, namely, by a contract to carry the products for a period of years at a rate lower than that which then prevailed. It is fair to say, therefore, that the contract in question was actually induced by competition. Its sole purpose was to get the business away from other roads by an offer of more advantageous rates and facilities.

It also offered to the packers the distinctive advantage of stability of rates, so that their business might be adjusted for a number of years with an absolute certainty of the expense of getting their product to market.

The right to make such a contract cannot be seriously contested. To deny it would be to place a burdensome limitation upon the forces of competition, contrary to the very letter and spirit of the Interstate Commerce laws. It has never been understood that an arrangement of this character was in any sense improper or illegal. In the very recent case of *Delaware, Lackawanna & Western Ry. Co. v. Kutter*, 147 Fed., 51, the Circuit Court of Appeals for the Second Circuit had under consideration a contract made to secure traffic for a term of years.

The contract involved in that case was one made by the railway company with one Westcott, by which he undertook to use his best endeavors to build up, develop, increase, facilitate, and conduct the business of transportation of "milk" over defendant's railroad, holding himself responsible for the milk so transported, and saving the railroad harmless from claims of a certain class arising from the milk business, together with certain other stipulations on his part. He was to collect the rates for the transportation of milk and pay over to the railroad company 80 per cent. of all charges so collected, retaining 20 per cent. in full compensation for his own services, the railroad company agreeing to receive and transport all the milk so furnished for transportation and agreeing that it would not permit any of its agents to do any act to interfere with the building up of the milk business of Westcott, and would grant him the exclusive privilege of transporting milk over its lines so far as it was permitted to do so by law, and furnish sufficient depot accommodations for the conduct of the milk business, and in addition agreed to furnish certain other facilities in connection with the carrying on of the same.

Judge Wallace, speaking for the court, said:

"The contract doubtless contemplated such a business relation and arrangement between the parties as followed its execution. Its purpose, so far as the defendant was concerned, was to enable the defendant to acquire a traffic which would have to be created, and which could not satisfactorily be built up and developed by the ordinary agencies of the defendant, and which the defendant conceived required the cooperation of Westcott. The peculiar conditions of the undertaking necessitated risks and responsibilities which the defendant was unwilling to assume, and the traffic could not be successfully developed and retained unless it was conducted with such a just regard to the interests of shippers as to be advantageous to them as well as to the defendant. In order to obtain this traffic without investing its own resources, and to carry it on with a minimum of inconvenience, expense, and risk to itself, the defendant saw fit to engage Westcott, and to put him in practically exclusive charge of the whole undertaking, upon terms and conditions which would be likely to be mutually advantageous to both parties. All this was in furtherance of its own business; and the remuneration Westcott was to receive, and the duration of the arrangment, were matters which concerned none but the parties to the agreement and which they were at liberty to settle between themselves. It cannot be questioned that railroad companies may lawfully make all necessary arrangements for increasing their own business and for expeditiously and economically carrying it on (United States *v.* D., L. & W. R. R. Co. (C. C.), 40 Fed., 101; Barney *v.* Steamboat Co., 67 N. Y., 301; 23 Am. Rep., 115). It is certainly competent for a railroad company to employ a traffic manager, and give him exclusive charge of that branch of the business to which his duty relates, and to contract with him for a specified period of service, and pay him a commission by way of compensation. It is likewise competent for a railroad company, in the absence of any legislative prohibition, to make an agreement with the producer or shipper of a particular class of shipments, for good and sufficient

> reasons, to carry them on any terms which the company may deem reasonable (Fitchburg R. R. Co. *v.* Gage, 12 Gray (Mass.), 393). As was said by the Supreme Court of Ohio in a case where the contract was to carry for a manufacturer at a fixed rate for a term of 10 years:
>
> "'We have a right to assume that the contract was to the mutual advantage of both parties, that it was made in good faith, and that its performance for the whole term would not have been injurious to the interests of the stockholders, or in any way suspend or abridge the powers conferred on the corporation to discharge the duties owed to the public as a common carrier for all on equal terms' (Railroad Co. *v.* Furnace Co., 37 Ohio St., 321; 41 Am. Rep., 509)."

The Chicago Great Western contract was concededly made in good faith. It was mutually advantageous to the parties concerned; otherwise it would not have been entered into. By its terms, particularly the reduced rate, the railway company sought to and did overcome many of the disadvantages under which it had hitherto labored in the struggle against its competitors for the business. This reduced rate was lawfully published and filed with the Interstate Commerce Commission and all shippers enjoy its advantage to the same extent as the parties to the contract. The making of a reduced rate, whether by contract or otherwise, is a typical and proper act of strenuous competition. This contract means nothing more nor less than that.

In *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 43 Fed., 37, Judge Jackson, in sustaining the issuance of "party-rate tickets," said (page 44):

> "The act to regulate commerce does not undertake to deal with the subject of rates for transportation services, or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, which paying due regard to the convenience of the public, any further than to declare the general principle that such rates

shall be reasonable and just, shall be free from unjust discrimination, and shall confer no undue or unreasonable preference or advantage, nor impose any undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations, the act does not, and was not intended to, restrict the common-law right and power of common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances, so as to promote their own interests, while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions, the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to common carriers the right to give or make lower rates, based on increased quantity or amount of service."

* * * * * * *

(Pages 50-51:)

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage, or subject to undue preference or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound and adopted in other trades and pursuits."

This case was affirmed, under the same title, in 145 U. S., 263.

In the case of Cotting *v.* Godard, 183 U. S., 79, this court recognized this right of carriers to contract with parties as to rates by quoting approvingly from Louisville, E. & St. L. R. Co. *v.* Wilson, 119 Ind., 352, the following language:

> "The law makes it the duty of every common carrier to receive and carry all goods * * * and authorizes a reasonable reward to be charged for the service. The amount to be paid is in a measure subject to the agreement of the parties; but when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, which is to be ascertained by the amount commonly, or customarily, paid for other like services."

It is claimed by appellant that this contract is void, because in restraint of trade. We do not see how this suggestion can be seriously urged. The making of the contract was an act of competition. If to procure a contract of this character is a violation of section 2 of the Sherman anti-trust act, on the ground that it tends to monopoly, then any act of competition by which a person engaged in trade secures business for himself at the expense of other parties engaged in the same line of business would be a violation of the act. It will be recalled that the evidence shows that the Chicago Great Western Railway Company made this contract to secure for itself, as against all the other roads, a certain amount of this traffic. There was no combination between the Great Western and other railway companies. It was an independent act of that corporation. If counsel's position that this tends to monopoly is correct, then every act of competition tends to monopoly, because it secures to the successful bidder for business a monopoly of the particular amount of trade which he is able to procure for himself as against his competitors. The anti-trust law has never been so construed, and cannot be so construed without defeating its very end. It would necessarily be a law for the destruction of competition if so construed. In the case of Hopkins *v.* United States, 171 U. S., 600, this court said, with reference to the Sherman act:

> "An act of Congress must have a reasonable construction, or else there would scarcely be an agree-

ment or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and, possibly, to restrain it."

And in the case of Whitwell *v.* Continental Tobacco Co., 125 Fed. Rep., 454, the learned Court of Appeals of the Eighth Circuit, in determining a suit brought to recover damages under the act to restrain commerce by a person who complained that the defendant refused to sell goods to him, clearly indicated the proper construction of section 2 of the Sherman act in the following language:

"It is contended, however, that this selection by the defendant of customers who refrained from selling goods of their competitors, violated section 2 of the anti-trust act because it was an attempt to monopolize * * * part of the trade or commerce among the several States. It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by section 2 of the act of July 2, 1890, chapter 647, 26 Stat., 209 (U. S. Comp. St., 1901, p. 3200)? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and *every transportation* of an article which is subject to interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale *or transportation*. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from a part of that trade; and if he may not do this, he may not compete with his rivals. All other persons and corporations must cease to secure for themselves any part of the commerce among the States, and some single corporation or person must be permitted to receive and control it, all in one huge monopoly.

> * * * It is an interpretation which fosters the mischief it was passed to remedy, and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of interstate commerce is illegal. The act must, as the Supreme Court has twice declared (Hopkins *v.* U. S., 171 U. S., 578, 600; U. S. *v.* Joint Traffic Ass'n, 171 U. S., 505, 568), have a reasonable construction. The purpose of the second section is the same as that of the first—to prevent the restriction of competition—and the two sections ought to receive similar interpretations." (The italics are ours.)

It would seem as though this opinion leaves nothing more to say upon this branch of the case.

III.

THE RATE ON LIVE-STOCK PRODUCTS BROUGHT ABOUT BY THE CHICAGO GREAT WESTERN CONTRACT DID NOT INVOLVE AN UNDUE PREFERENCE OR UNJUST DISCRIMINATION WITHIN THE MEANING OF THE INTERSTATE COMMERCE LAWS.

The proceedings from which this appeal has been taken were brought under section 3 of the Interstate Commerce act, and also under section 3 of the Elkins law. These sections are as follows:

Interstate Commerce act:

> "SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Elkins act:

> "SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction," etc.

It will be observed that section 3 of the Elkins law adds nothing, so far as our purposes here are concerned, to the provisions of the Interstate Commerce act, and the sole question presented is whether these rates upon live-stock products constitute any undue or unreasonable preference or unjust discrimination in violation of section 3 of the Interstate Commerce act.

There is no doubt that when we come to compare the rates published on live-stock products with those upon live stock, there is an apparent discrimination in favor of the former and against the latter. We have already, in the analysis of the testimony, demonstrated that the one class of rates is not unreasonably low, and that the other is not unreasonably high. The question now before us is simply whether this apparent discrimination between the two classes of traffic is such a discrimination or preference as was intended to be covered by the law. On this subject the authorities, as we shall show, are entirely harmonious. The act was never designed to prohibit every discrimination or preference, and it may be confidently asserted that where a rate is established as the result of competition the objection that it is discriminatory or preferential is without merit. The Interstate Commerce law and cognate acts were all intended to encourage competition, and their provisions cannot be construed so as to hinder in any way the full exercise of all of the rights of competition which theretofore

existed. In *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S., 276, this court said:

> "The principal objects of the Interstate Commerce act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads. * * * It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. * * * Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."

Again:

> "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."

In the case from which these quotations are made, known as the *Party Rate case*, the court held that the making of party rates for the transportation of ten or more persons at a rate less than that charged to a single individual for a like transportation on the same trip did not constitute an unjust and unreasonable charge against the individual or an unjust or unreasonable preference or advantage to the purchasers of the party-rate ticket, within the meaning of the act.

A very recent decision by this court along the same line is *East Tennessee, Virginia & Georgia Ry. Co. v. Interstate*

Commerce Commission, 181 U. S., 1. There the complaint was that the through rates from New York to Nashville, Tennessee, were materially less than the through rates from New York to Chattanooga, although the latter point was, by the defendant's lines, nearer to New York than Nashville by about 150 miles. The Nashville rates were lower than the Chattanooga rates in some instances by the full amount of the local rate back to Chattanooga. There could be no doubt on these facts of the existence of a substantial preference in favor of the traffic going to Nashville and a substantial discrimination against Chattanooga. The evidence showed, however, that the Nashville rates were fixed by competition with other lines which did not pass through Chattanooga. The court accordingly held that the preference and prejudice were not "undue or unreasonable" within the meaning of the act. Mr. Justice White, writing the opinion of the court, said:

> "In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter-distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer-distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act, forbidding the making or giving of an undue or unreasonable preference or advantage, will not apply. *The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers.* And special attention was

> directed to this view in the *Behlmer* case in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination."

Here was a definite and emphatic holding that a discriminatory or preferential rate established under conditions of competition was not inhibited by the provisions of the act. Manifestly a preference or discrimination with respect to localities can stand on no different footing from one with respect to individuals or classes and kinds of traffic.

We direct attention next to the case of *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S., 197. Here it appeared that the railway company was making a higher charge upon inland traffic originating at New Orleans and carried to San Francisco than was made for carrying the same class of freight between the same points when it originated at Liverpool and participated in through rates from Liverpool to San Francisco via New Orleans. It was held that this did not constitute an undue or unreasonable preference or prejudice, inasmuch as the through rates from Liverpool to San Francisco were effectually controlled by the competition of sailing vessels for the entire distance, by steamships and sailing vessels operated in connection with railroads across the isthmus of Panama, and by steamships and sailing vessels operated in connection with the Canadian railways. In other words, the discrimination or preference was the result of competition, and therefore could not be considered to be "undue or unreasonable." Comment-

ing upon the meaning of the third section of the Interstate Commerce law, the court said:

> "The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law but of fact. The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

The applicability of this decision to the case now before the court is obvious. The preference, such as it is, in favor of the traffic in live-stock products and against the traffic in live stock is clearly as much a result of competition as was the preference given to the import business between New Orleans and San Francisco in the *Texas and Pacific Railway* case.

The same principles were laid down in *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S., 144. This was another complaint similar to that made in the case in 181 U. S., above referred to. The rate for the longer distance was materially lower than that for the shorter, but the former was forced upon the carrier by competition with other roads which did not run through the other point. The court laid down the rule as follows:

> "In construing statutory provisions forbidding railway companies from giving any undue or unreason-

> able preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable."

The court went on to say that "the question whether competition as affecting rates is an element for the Commission and the courts to consider in applying the provisions of the act to regulate commerce is not an open question in this court."

In *Louisville & Nashville Railroad Co. v. Behlmer,* 175 U. S., 648, this court again announced the principle that the effect of competition must be taken into consideration in dealing with the question whether the statute has been violated. This case involved the rates upon hay from Memphis, Tennessee, to Summerville and Charleston, South Carolina, the rate to Summerville being materially higher than the rate to Memphis, although the distance was 20 miles shorter. The Charleston rate was fixed and controlled by competition of rival lines which did not pass through Summerville. It was held that the preference was not "undue or unreasonable." Both the Commission and the circuit court had held in this case, as a matter of law, that competition, however material, arising from carriers who were subject to the Interstate Commerce act could not be taken into consideration, and, furthermore, that all competition, however substantial, not originating at the original point of traffic was equally, as a matter of law, to be excluded from view. This court held that the construction thus placed upon the law was erroneous, and that under the fourth section of the act, relating to the long and short haul, all competition having a substantial and material effect upon traffic and rates was proper to be taken into consideration as the producing cause of dissimilarity of circumstances and con-

ditions warranting a lower rate. The rule governing the carrier in this regard was thus laid down:

> "It follows that whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. Second. That the competition relied upon be not artificial or merely conjectural, *but material and substantial,* thereby operating upon the question of traffic and rate-making the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered."

It will be borne in mind that the court below found as a fact that the competition in this case was material and substantial, and that the rates complained of were the actual result of such competition. (See 4th and 5th findings of fact.) In this connection it is worthy of notice that the question whether competition is controlling in any given case is not a question of law, but of fact (Texas & Pacific Ry. Co. *v.* Interstate Commerce Commission, *supra;* Judson on Interstate Commerce, section 177, and authorities there cited).

In *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.,* 190 U. S., 273, the long-and-short-haul clause was again under consideration, and the principle was reiterated that, when competition which controls rates prevails at a given point, a dissimilarity of circumstances and conditions is created justifying a carrier in charging a lesser rate to such point (it being the longer distance) than it

exacts to a shorter distance and non-competitive point on the same line.

The recent case of *Delaware, Lackawanna & Western Ry. v. Kutter*, cited *supra*, decided by the Circuit Court of Appeals of the Second Circuit, involved the validity of a contract between the railway company and one Westcott, whereby, as we have shown, the latter undertook, upon certain terms, to build up the business of transportation of milk over the company's line. Among other things, Westcott agreed that he would not charge for transportation "rates in excess of those charged by competitive railroads for similar services." He was to have full charge of such business, receiving as compensation a percentage of the freights earned, and was to have the exclusive privilege of transporting milk over the company's lines "so far as it was permitted to do so by law." Among other contentions urged by the company was the one that the contract contravened the provisions of section 3 of the Interstate Commerce act, because it gave an undue and unreasonable preference to Westcott in the business of transporting milk. The court dealt with this argument as follows:

> "That act deals with the effects or results of contracts, and has no operation directly upon the contracts themselves; but, assuming that the contract is void, if the contention that it gave an undue and unreasonable preference is sound, the case is not one where any such preference was given. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another (*Wight v. United States*, 167 U. S., 516; 17 Sup. Ct., 822; 42 L. Ed., 258). The mere circumstance that there is, in a given case, a preference or advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act (*Texas & Pacific R. R. Co. v. Interstate Commerce Com.*,

> 162 U. S., 219, 220; 16 Sup. Ct., 666; 40 L. Ed., 940). To come within the inhibition of the act, 'the positions of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other' (*Interstate Commerce Com. v. B. & O. R. R.*, 145 U. S., 263, 282; 12 Sup. Ct., 844; 36 L. Ed., 699). Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Interstate Commerce act 'leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits' (*Interstate Commerce Com. v. Alabama Mid. R. R. Co.*, 74 Fed., 715; 21 C. C. A., 51; 41 U. S. App., 453; *Id.*, 168 U. S., 144, 173; 18 Sup. Ct., 45; 42 L. Ed., 414)."

In Judge Jackson's opinion in the "party-rate case" in the court below, 43 Fed., 37, the proper construction to be placed upon the Interstate Commerce act was very clearly stated. He said:

> "Subject to the requirement of section 1, that all charges made for any service rendered in the transportation of passengers or property shall be reasonable and just, the language of section 2 clearly recognizes and implies that there may be discriminations which are not unjust and not prohibited. So, too, the language employed in section 3, declaring it unlawful to make or give any 'undue or unreasonable preference or advantage' to any particular per-

son, etc., or to subject the same to any 'undue or unreasonable prejudice or disadvantage,' clearly implies that there may be a preference or advantage on the one hand, or a prejudice or disadvantage on the other, which is not undue or unreasonable, and therefore not in contravention of the law. To be within the statute the discrimination must be 'unjust' and the preference or prejudice must be 'undue' or 'unreasonable.' "

* * * * * * *

"Persons in like situations, requiring or desiring like and contemporaneous service on the part of carriers, were to be treated, in the matter of rates, impartially. This is expressed both affirmatively and negatively in the language of section 3. The carrier shall not give any undue or unreasonable preference or advantage to or in favor of any particular person, company, or traffic, nor subject any particular person, company, or traffic to any undue or unreasonable prejudice or disadvantage. These words necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced, and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference or impose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic affected bear to each other and to the carrier. When so long as their relations are similar or 'substantially' so, the carrier is prohibited from dealing differently with them in the matter of charges for a like and contemporaneous service."

* * * * * * *

"Under the flexible and elastic rule prescribed by said sections, construed in the light of section 1, a difference in charges, while an element in the proper

> definition of unjust discrimination or undue preference, is by no means the sole or controlling factor. To come within the inhibition of said sections the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions."

After an exhaustive review of the English decisions bearing upon the act from which our law was copied, the learned judge said:

> "The English cases referred to above, and others that might be cited, establish the rule that, in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate but proper to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities of volume of the traffic involved, the relative cost of the service and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise."

It is interesting to observe that in the very recent case of Platt *v.* Le Cocq, 150 Fed. Rep., 391, the learned circuit court held that a statute of South Dakota reading, "It shall be unlawful for any common carrier subject to the provisions of this article to make or give any preference or advantage to any particular person, firm, company, corporation or locality, or any particular description of traffic, in any respect whatever, or to subject any particular description of traffic to any prejudice or disadvantage in any respect whatever," must be construed to prohibit only undue and unreasonable prejudice or advantage. The court said (at page 397):

> "The court is of the opinion that the language of the statute referred to must be construed as only prohibiting the subjection of any particular person, company, firm, corporation, or any particular de-

scription of traffic to an unreasonable prejudice or disadvantage. The Board of Railroad Commissioners seems to have put this construction upon the law as appears from their findings and conclusions, and the court is of the opinion that this view of the law is correct, as the legislature could not have intended a literal enforcement of the statute, because that would leave the express company no discretion in the conduct of its business, whatever, and if the law could be construed as prohibiting any prejudice or disadvantage, the validity of the law would be in danger. A similar clause in the act of Congress known as the Interstate Commerce act, contains the words 'undue and unreasonable,' and the court believes that the present law should be interpreted as though these words were in the law."

In *Interstate Commerce Commission v. Western & Atlantic Ry. Co.*, 93 Fed., 83, the Court of Appeals for the Fifth Circuit had before it a case of apparent discrimination as to localities under the long-and-short-haul clause. It appeared that the rates complained of were the outcome of competition, and it was accordingly held that there was not, within the inhibition of the third section of the law, any undue or unreasonable preference or advantage given in favor of the competitive point, or any unreasonable prejudice or disadvantage against the intermediate point where the higher rate prevailed.

It will be observed that many of the cases above dealt with relate primarily to section 4 of the Interstate Commerce act, containing the long-and-short-haul clause. It was contended in the court below that the principle of competition does not apply where section 3 is involved. An examination of the authorities, however, will show that in practically every instance the question of the effect of section 3 was also raised. This was especially true of the case of *East Tennessee, Va. & Ga. Ry. Co. v. Interstate Commerce Com., supra*, where it was said that the prohibition of the third section was directed against unjust discrimination or undue preferences

arising from the voluntary or wrongful act of the carrier complained of, and does not relate to acts which are the results of conditions wholly beyond the control of such carrier. The court went on to consider the facts with reference to competition, and held that where competition was controlling, the preference was not undue or the discrimination unjust. See also—

Interstate Commerce Com. *v.* Alabama Midland Ry. Co., *supra.*

Interstate Commerce Com. *v.* Clyde Steamship Co., 93 Fed., 83.

Judson on Interstate Commerce, sections 175 to 183.

SECTION 2 OF THE INTERSTATE COMMERCE ACT HAS NO APPLICATION TO THIS CASE.

This section reads as follows:

> "That if any common carrier subject to the provisions of this act shall directly, or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person, or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects or receives from any other person, or persons, for doing for him, or for them, a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited, and declared to be unlawful."

We have shown in our analysis of the testimony in this case—and it would almost seem apparent at a glance—that live stock and packing-house products are not "a like kind of traffic;" nor is there performed in the transportation of these two classes of traffic "a like and contemporaneous service." There are many points of dissimilarity, both in the

kind of traffic and in the service. Cattle and hogs are alive, and subject to all classes of hazards and risks that apply to live animals. They are transported in a particular kind of cars, with particular ventilation. Stock yards are maintained for loading them into the cars, and for feeding and watering them en route. Trains carrying them are run upon such schedules as to reach certain markets; otherwise railroads are penalized and obliged to pay claims for damages. Persons in charge of the stock are carried free to the market, and thence back to their homes. On the other hand, the service performed in the transportation of dressed meats and packing-house products is that which pertains to dead freight shipped under refrigeration. It is more nearly like the transportation of fruit. The stock yards and feeding yards required in the case of live stock are not needed. No persons receive passes to accompany and look after these shipments. It is not necessary that they be taken through on any particular schedule of time. No damages are asserted or collected for delay. As a matter of fact, we cannot think of any two kinds of traffic more dissimilar, and clearly there is not even an approach to similarity in the kind of service required and rendered; therefore there can be no substantial argument made that the second section of the act has any application whatever to this case.

IV.

NEITHER THE COMMISSION NOR THE COURT HAD THE RIGHT TO IGNORE THE RELATIVE COST OF THE SERVICE IN DETERMINING WHETHER THE APPARENT DISCRIMINATION WAS UNDUE OR UNREASONABLE.

The testimony, which has been fully considered in the analysis submitted herewith, clearly shows that the expense of handling live-stock traffic is much greater than the cost of transporting the products of live stock. The court below

found this to be the fact upon the evidence. Upon that ground alone the difference in rates is justified. The appellant, to maintain its contention, must insist that this element of cost be disregarded. We have shown in our comments upon the testimony that, in so far as the live-stock movement from Missouri River points and St. Paul is concerned, the proportional rate, which is less on the average than the rate upon the product, is the rate that is applied. Therefore, as was practically conceded in the argument in the court below, the only question left for consideration was as to the relation between the rates on the product from the western packing-house centers to Chicago and the rate from the zone east of the Missouri river and south of St. Paul, where the rates on live stock which are questioned apply. It was developed, and the court found, that the rates from that zone were in and of themselves reasonable. It was also established that the cost of moving this traffic was much greater than the expense of moving the product from these various market towns to Chicago. Therefore it must necessarily be claimed by appellant that commercial considerations alone demand that these rates be readjusted without reference to the cost of conducting the business. We have shown by the testimony, and the court below has found, that the movement of the traffic is not affected by the rates. It was demonstrated that in spite of the fact that the live stock raised in the country naturally tributary to Chicago has decreased, the shipments to that market have increased. The Interstate Commerce Commission itself, in the case of Squire & Co. *v.* Michigan Central Railroad Co., 3 I. C. C. R., 521, specifically held in a similar case that this theory, which must be relied upon by appellant, is fallacious. In its opinion in that case the Commission said:

> "The complainants have advanced the theory that the Commission in fixing these relative rates should be governed by commercial considerations wholly independent of the cost of carriage. It was said by Mr. Squire, one of the complainants, in his testimony

that railroads should make just, relative rates so that both parties could live, and that 'the product rate should be higher than the live-hog rate, even if the cost of transporting the two articles be the same, which is not the case.' It is to this theory that the complainants have very largely directed the attention of the Commission. A rate which is based upon this theory would have to vary in the case of the live hogs with every change in the market price of the animals in the western markets. Rates for the transportation of property should be arrived at, and based so far as practicable, upon permanently continuing fixed facts. The conditions and fluctuations of the markets of the country are so frequent, especially as to competitive articles, and oftentimes unexpected, that commercial considerations alone would not furnish a sufficiently stable and fixed rule for guidance in making a rate which ought to remain substantially permanent through all fluctuations. Upon this point, so strenuously urged by the complainants, that carriers should adjust their rates in a way to produce equality between the competitors in all the markets, it must be apparent that it would be a useless task for the Commission, even if it had the power, to attempt such a result. It would involve a careful research into all the circumstances surrounding the business of each locality, as questions of rent, rates of taxation, cost of labor, and many other things which suggest themselves. The evident result would be that there would have to be as many differently constructed rates as there were different localities. * * * We are of the opinion that in the fixing of relative rates upon articles strictly competitive, as these are, the proper relation should be determined from the cost of the service; and if the difference in this respect between two competitive articles can be ascertained, such rate should be fixed to each as corresponds to the cost of service."

Applying the rule thus laid down by the Commission, of which Judge Cooley was then the chairman, the decree of the court below must be affirmed, even if we concede that

the Commission had any right to make relative rates, or to consider the relation of one class of traffic with another.

V.

The Commission previous to the amendment of the law in 1906 had no power to fix rates, and hence no power to establish the relation between rates.

In Cincinnati, N. O. & Tex. Pac. Ry. Co. *v.* Interstate Commerce Commission, 162 U. S., 184, this court held that the Interstate Commerce Commission had no power to fix rates. After permitting the question to be fully reargued, the court reaffirmed its conclusion in the case of Interstate Commerce Commission *v.* Cincinnati, N. O. & Tex. Pac. Ry. Co., 167 U. S., 479, and again in Interstate Commerce Commission *v.* Alabama Midland Ry. Co., 168 U. S., 145.

In the case of Southern Pacific Co. *v.* Colorado Fuel & Iron Co., 101 Fed. Rep., 779, the Court of Appeals of the Eighth Circuit, following the decisions above quoted, held void an order of the Commission that the rate from Pueblo, Colorado, to San Francisco, California, should be only a certain percentage of the rate fom Chicago to San Francisco.

Judge Thayer in the opinion said:

> "Prescribing a rate from Pueblo, Colorado, to San Francisco, California, by reference to a rate that had theretofore been established by carriers between Chicago and San Francisco, involved the exercise of legislative functions to the same extent as fixing the rate between the former points on an independent consideration of what would be a reasonable compensation for the service. In either event far-reaching questions of public policy arise, and many circumstances and conditions affect the question to be solved, so that it cannot be said that the problem of fixing a reasonable rate from Colorado points to the Pacific slope became a simple one, involving no exercise of legislative discretion, when it appeared that the carriers had established a rate from Chicago to Pacific

> Coast points. * * * We feel constrained to hold that the Commission exceeded its authority in this part of the order, and that it had no more power to fix a rate from Pueblo to San Francisco by relation to the theretofore existing rate from Chicago to San Francisco than it had to fix the former rate upon an independent consideration of what would be a reasonable charge."

In the case under consideration the railroads have established a rate upon dressed meat and packing-house products which was determined by competition and fixed for the period of the Great Western contract. It was attempted by the order to make a rate on live stock which should be the same as that upon the product. This was clearly beyond the power of the Commission at the time the order was made.

VI.

THE FINDINGS OF FACT OF THE LOWER COURT, FROM WHICH THE CONCLUSION NECESSARILY FOLLOWED THAT RESPONDENTS HAVE A DECREE IN THEIR FAVOR, WAS ABUNDANTLY SUPPORTED BY THE TESTIMONY AND THE LAW.

We ask the court to give full effect to the conclusions of the trial court on the disputed questions of fact in this case, and invite its consideration to the authorities cited by the learned trial court in support of the various propositions announced by it. The findings were abundantly justified by the testimony, and the legal conclusions naturally followed under the repeated decisions of this court.

Respectfully submitted,

CORDENIO A. SEVERANCE,
FRANK B. KELLOGG,
ROBERT E. OLDS,
Solicitors for Respondent
Chicago Great Western Ry. Co.

Office Supreme Court, U. S.
FILED.
APR 12 1907
JAMES H. McKENNEY,
CLERK.

In The

Supreme Court of the United States

INTERSTATE COMMERCE COMMISSION,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, ET AL.

No. [redacted] 73.

OCTOBER TERM, 1906.

BRIEF ON BEHALF OF ST. JOSEPH STOCK YARDS COMPANY OF ST. JOSEPH MISSOURI, INTERVENOR.

STEPHEN S. BROWN,
JOHN E. DOLMAN,
Solicitors.

In The

Supreme Court of the United States

INTERSTATE COMMERCE COMMISSION,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, ET AL.

No. 352.

OCTOBER TERM, 1906.

BRIEF ON BEHALF OF ST. JOSEPH STOCK YARDS COMPANY OF ST. JOSEPH MISSOURI, INTERVENOR.

STATEMENT.

The Chicago Live Stock Association is an incorporated company without capital stock, the object of which, as stated in its charter, is

> "To establish and maintain a commercial exchange; to promote uniformity in the customs

and usages of merchants; to provide for the speedy adjustment of all business disputes between its members; to facilitate the receiving and distributing of live stock, as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate rights."

On April 5, 1902, it complained by petition to the Interstate Commerce Commission; 1st, that the rates charged and received by the defendant railroad companies for the transportation of live stock, in carloads, from points in Iowa, Missouri, Minnesota and Wisconsin, to Chicago, were in and of themselves, and relatively in comparison with their rates on the products of live stock, unjust and unreasonable, in violation of section 1 of the act to regulate commerce; 2nd, that the raisers of live stock in those states were subjected to an undue and unreasonable prejudice and disadvantage by reason of the rates charged, collected and received by them for the transportation of the products of live stock from Kansas City, South St. Joseph, South Omaha, Sioux City and South St. Paul, to Chicago and points east thereof, in violation of section 3 of the act to regulate commerce; and, 3rd, that the rates charged, collected and received for the transportation of the product of live stock from the same points to Chicago and points east thereof, and those charged, collected and received for the transportation of live stock from the same markets and intermediate points in Iowa, Missouri, Wisconsin and Minnesota, to Chicago, subjected the City of Chicago and the complainant to an undue and unreasonable prejudice or disadvantage,

in violation of section 3 of said act.

The stock yards companies at Kansas City, St. Joseph, Omaha and Sioux City, representing all the live stock markets on the Missouri river, intervened in this proceeding. A hearing was had in November, 1902. Evidence was introduced from which the Commission found the following facts:

On December 1, 1894, all the railroads engaged in the traffic made a rate of 23½ cents per 100 pounds on cattle and hogs and their products from the Missouri River points to Chicago. This remained practically unchanged until January 1st, 1902, when they made what they called a proportional rate of 18½ cents on the Missouri River live stock product destined to points east of the Indiana-Illinois state line. This adjustment remained in force until the filing of the complaint referred to.

> "Since all or nearly all the live stock carried easterly from the Missouri River is shipped there in the first instance from other points, practically no shipments are made from the river to Chicago upon the local rates in force between those points, and such rates are therefore important, principally, because of their effect upon intermediate points."

During the pendency of said proceeding on August 8th, 1902, the defendant Chicago Great Western Railway Company made a contract with all packers doing business at Missouri River points, by which the railroad company was, for a period of seven years, to transport a given percentage of the entire product of their Missouri River plants and of the plant at South St. Paul, Minnesota, upon a rate of 20 cents local to Chicago and a proportional rate of 18½ cents on the product destined to points east of the Indiana-Illinois state line.

This contract of course compelled all the railroads participating in this business to publish the same rates, and the hearing was had with reference to the conditions thereby created. This contract has been a controlling influence in the honest maintenance of these rates ever since.

The condition of things at St. Joseph and other Missouri River points was then as follows: A proportional rate on cattle and hogs of 18½ cents per hundred pounds to Chicago was in force upon which all stock transported from those points was carried. A similar proportional rate of 18½ cents from these points to Chicago was in force on packing house products, including fresh meat, destined for points east of the Indiana-Illinois state line, and a straight 20 cent local rate on all products of live stock from these points to Chicago. A local rate of 23½ cents on live stock from these points to Chicago, was also in force, the only effect of which was to fix the minimum rate from intervening stations by operation of Section 4 of the Interstate Commerce Act, thus creating what was called the 23½ cent zone, extending perhaps 100 miles east from the river. Even from this zone much the larger part of the live stock goes to Chicago for market. All the railroads participating in this traffic at St. Joseph, except the Chicago Great Western, had lines west of the Missouri river serving territory in which immense quantities of live stock were produced. This made it to their interest, of course, that live stock coming over their lines should be retained by them for the long haul, as it was called, to Chicago. If it should be stopped in St. Joseph for manufacture, the Chicago Great Western would get its share of the product destined locally to Chicago, which is the destination of practically all live stock reaching that place from the West. To avoid this it will be seen that the proportional live stock rate to Chicago was made 1½ cents

cheaper than the local rate of the product to the same point. This difference in favor of live stock to Chicago was stretched at various points where the competition would bear it. This is interestingly shown in a little table of Rock Island rates to, from and through St. Joseph, on page 753 of the record, in which Steinauer. Nebraska, an important live stock station served only by that company, is given the inducement of a 17 cent proportional from St. Joseph to Chicago. The further manipulation of these rates to secure the haul to Chicago is nicely illustrated by the same table. Princeton, for instance, on the road from St. Joseph to Chicago, 105 miles from St. Joseph and 393 from Chicago, has a cattle rate of 22 cents. This would entitle it on a mileage basis to a rate to St. Joseph of 6 1-10 cents, while the actual rate charged it is 11½ cents. On the basis of the St. Joseph rate, its Chicago rate should be 43 cents. On hogs the Princeton rate to St. Joseph is 13½ cents. Upon a mileage basis founded upon this rate the Chicago rate should be 50 cents, while in fact it is 23½ cents, or less than half that amount. Founded upon the Chicago rate the St. Joseph rate should be 6¼ cents, which is less than half of what it actually is.

It will be seen from the foregoing statement, which, with the exception of the reference to the table of the Rock Island rates, which is admittedly correct, is taken from the findings of the commission, that the only practical object of that proceeding was to compel a readjustment of the live stock rates at local stations lying between St. Joseph and the other Missouri River points and Chicago, so as to further compel the shipping of live stock from that territory to Chicago for manufacture. The decision of the Interstate Commerce Commission in Chicago Board of Trade vs. Chicago and Alton Railroad Company, 4 I. C. C. Rep., and Squire & Co. vs. Michigan Central Railroad Company, 4 I. C. C. Rep.

611, in which the commission in effect held that it was among its duties to hold for Chicago the meat manufacturing business which that city had taken from Cincinnati, furnished the pretext and fostered the hope that this could be done.

The commission stood by its former ruling and made an order as follows:

> "This case being at issue upon complaint and answers on file, and being duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof made and filed a report and opinion containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order:
>
> "It is ordered that in accordance with said report and opinion the present relation of rates maintained and enforced by defendants * * * * * * whereby their rates for transportation are higher upon live cattle and live hogs than upon dressed or prepared products of cattle and hogs on shipments thereof to Chicago in the State of Illinois from points on the Missouri river, Sioux City, in the State of Iowa, to Kansas City, in the State of Missouri, inclusive, and from South St. Paul, in the State of Minnesota, or from points in the territory between the Missouri river or South St. Paul and Chicago, constitutes a wrongful prejudice and discrimination in violation of the act to regulate commerce and that said defendants be, and each of them is hereby, notified and required to cease and desist on or before the 15th day of

February, 1905, from maintaining or enforcing the said unlawful relation of rates and from further continuing said unlawful prejudice and discrimination." (Page 48).

There was no finding that the local live stock rate was an unreasonable one.

This suit was instituted by the commission under Section 16 of the Interstate Commerce Act to enforce this order. Apparently from abundant caution the commission also filed in the same court its petition under Section 3 of the Elkins Act, which gives it the right to so proceed in cases where the carriers shall transport traffic at less than its published rates on file, or commit discrimination forbidden by law. This section has no reference to unreasonable rates, and the commission so construing it confined itself in its petition to the same matter of prejudice and discrimination mentioned in its order, so that the reasonableness of the local live stock rates between Missouri River points and Chicago is not, and cannot under the jurisdiction granted by the acts, be in issue here, although the Circuit Court has properly found these rates to be reasonable.

The order can be as well complied with by raising the rate on product as by lowering it on live stock.

ARGUMENT.

It will be seen from the foregoing statement that the defendant railroad companies have only an incidental interest in this controversy. The City of Chicago, which the original complainant assumes to represent, is the real party on the one hand, and the Missouri River cities constituting its live stock markets, the population of which has been principally acquired and is now largely sustained by the manufacturing industries incidental to these markets, are the parties on the other side. These two communities are competitors for the growth and prosperity incident to the manufacture of the products of western farms and pastures.

The people on the Missouri River believe that the ideal place for any manufacture is where its raw material can be assembled with the greatest ease and expedition and the least cost; that in case of live stock it is creditable to take into consideration the same humanitarian reasons that have already induced congress to pass laws for the protection of these animals from unnecessary suffering while undergoing transportation which is cruel at its best; that they ought not to be required to uselessly transport offal for long distances and at great expense; that they ought not to have to submit to the burden of a thousand miles of useless travel with its consequent absence from their families and business whenever it is necessary for them to attend the markets in which the products of their labor is sold; and that they have the right to take advantage of all the elements of competi-

tion in transportation which are open and free and equally available to all business localities similarly situated, to enable them to obtain these advantages.

It is on the other hand contended by the Interstate Commerce Commission representing those who claim to represent Chicago that the act creating it has given it a supervisory control over the development of the country through the manipulation of transportation, which is a controlling factor in such development; that competition in transportation should be restrained rather than encouraged, lest the industrial development in its western march should outstrip some of its neighbors, and that whenever a danger of this kind occurs they ought to sit down with pencil and paper and such information as they can obtain from interested persons claiming to be experts, and figure out mathematically to the very cent how far these natural forces should be permitted to exert themselves. If we believed such powers to be conferred by the act of Congress invoked in this case we should greatly fear that a jurisdiction had been given this commission far more dangerous than all the abuses the act creating it was designed to correct.

The first section of the Act to Regulate Commerce provides in substance that all charges made for services rendered in connection with transportation shall be reasonable and just. In the form which this case has assumed there is no claim that any unreasonable or unjust charge is involved. The finding of the Circuit Court to this effect is conclusively sustained by the evidence, so the real charge is that the defendant railroad company in the interest of the communities represented by the intervenors, has made its charges upon a species of traffic in which they are interested unduly and unreasonably low. It also appears that this low rate was brought about by the very kind of competition which the act in question, as well as the anti-trust act, was designed to

protect, foster and encourage—the desire of one of the carriers involved, by making this rate, to get his share of the business, which the control of the traffic in its inception by his competitors that span the Missouri river, prevented him from otherwise obtaining. The contention that he must either now violate his contract or pay a penalty out of his reasonable receipts on other traffic for having obeyed these laws in their letter and spirit.

The second section is directed against demanding, collecting or receiving in any manner whatever a greater or less compensation for a service rendered in connection with transportation than is collected, demanded, or received from another for a like and contemporaneous service in the transportation of like traffic under substantially similar circumstances and conditions. The act here denounced is characterized as unjust and made unlawful. Upon first reading this act we were impressed that the provisions of the two sections already referred to, together with the long and short haul provision of section 4, constituted the entire expression of Congress with reference to the manipulation of rates, and that the undue preferences and advantages referred to in section 3 included only matters relating to the use of the facilities which it was the duty of the carriers to afford, such as the prompt furnishing of cars, the service of coal mines loading by tipple, and a thousand other things absolutely necessary to enable the public to enjoy the advantages of this class of transportation; but in this case it is unnecessary to consider this question, for the preference or advantage referred to must be undue and unreasonable, and it cannot be that advantages in open rates necessary to procure the business in the face of legitimate and controlling competition can be considered unjust and unreasonable in the face of laws which jealously protect such competition by forbidding the acquisition or control of competing lines, the pooling of busi-

ness, and agreements and combinations in restraint of trade or commerce, and otherwise fostering such competition.

We do not wish to be understood as making these suggestions from the standpoint of the defendant railroad companies, which are no doubt perfectly able to take care of themselves in this court. The market which we represent, which practically means the city of St Joseph, in which it is situated, and of which it constitutes the principal interest, has the right to the very competition which exists in this case, and which constitutes its controlling element.

In *Hozier vs. Caledonian Railway*, 70 Sess. Cas. (2d Series, 302, S. C. Nev. & Macn. Railway Cases 27), quoted with approval by this court in *Interstate Commerce Commission vs B. & O. Railway Co.*, 145 U. S. 263-283, complaint was made by one who had frequent occasion to travel that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were charged to other through passengers between these termini, contrary to the provisions of the English Traffic Act of 1854, which contains a clause similar to section 3 of the Interstate Commerce Act. The Scotch Court of Session, in holding that the petitioner had shown no title to maintain the proceeding, his only complaint being that he did not want parties going from Edinburgh to Glasgow to have a cheaper rate than he himself could enjoy from intermediate stations, said:

> "It provides for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain."

This court, after quoting many other cases to the

same effect, said:

> "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."

The parties buying cattle in Chicago which have been transported from the western plains may be in direct business competition with the manufacturers on the Missouri river, who ship their product to Chicago, but to say that they are competitors as shippers of the product or that they occupy any relation to each other except as open competitors in the same business of manufacture, each having, by the untrammeled exercise of his own judgment, cast his lot in a different part of the country surrounded by different market and transportation conditions, and that their relations are subject to the beneficent control of the Interstate Commerce Commission, is carrying the idea of fraternal government farther than it has yet gone.

The case of *East Tennessee, Virginia & Georgia Railway Co. vs. Interstate Commerce Commission* is instructive on this question. In that case the classification of railroads carrying from the Atlantic seaboard to points north of the Ohio river made lower rates generally than the classification prevailing over the Southern lines to points south of that river. The northern classification was for some reason applied to Nashville, reached from Cincinnati by the Louisville & Nashville Railroad, making the rate lower than that of the East Tennessee line to Chattanooga, through which it passed to Nashville. To meet the competition of the Louisville & Nash-

ville Company the East Tennessee Company made the same rate to Nashville via Chattanooga, thereby carrying the traffic at a less rate for the longer distance than for the shorter. The commission held that this was unjust to Chattanooga and should be stopped, but this court thought differently, and held that the East Tennessee Company had the right to meet the lower rate, and that Chattanooga could not complain because it was not permitted to participate. While the facts in that case differ from those in this case the principle seems to be the same. Nashville had the right to the competitive rate, and its rival, Chattanooga, could not complain so long as its rate was reasonable.

We repeat that we have not made these suggestions by the way of an argument of the many points involved, but simply for the purpose of giving emphasis to the position which the city of St. Joseph and the Stock Yards Company, which constitutes its market, occupies in this case.

STEPHEN S. BROWN,

JOHN E. DOLMAN,

Solicitors for St. Joseph Stock Yards Company.

Supreme Court of the United States.

INTERSTATE COMMERCE COMMISSION,
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY, ET AL.

No. 352.

October Term 1906.

Brief on Behalf of Union Stock Yards Company of Omaha, (Limited) Intervener.

STATEMENT OF THE INTERVENERS' POSITION IN THE CASE.

The basis of this action is an order made by the Interstate Commerce Commission in a case brought on April 5th, 1902, before it on the complaint of the Chicago Live Stock Exchange against the defendant railroad companies under the 13th section of the Act to Regulate Commerce, alleging violations of sections 1 and 3 of that Act by different railroad companies, in this that the rates exacted by the railroad companies for transporting live stock and product thereof in carload lots to Chicago from South St. Paul, Sioux City, South Omaha, St. Joseph and Kansas City are unreasonable *per se*, and relatively unreasonable compared with the rates exacted for transporting product of live stock from these points to Chicago; that this adjustment of rates subjected the locality of Chicago

and shippers of live stock in the states of Iowa, Missouri, Minnesota and Wisconsin to unreasonable prejudice and disadvantage.

When the case came on for hearing before the Commission the Union Stock Yards Company of Omaha (Limited) appeared and obtained permission to intervene and be made a party to the proceedings, as did also the St. Paul Union Stock Yards Company, the St. Joseph Union Stock Yards Company and the Sioux City Union Stock Yards Company. The Minneosta Railroad & Warehouse Commissioners were likewise made parties, as was also T. M. St. Clair & Company doing a packing business at Cedar Rapids, Iowa. The hearing before the Commission resulted in the opinion found on pages 28-47 of the printed record, and in the order in accordince with the opinion on pages 48-9.

When the action at bar was commenced in the Circuit Court to enforce the order of the Interstate Commerce Commission these stock yards companies on the Missouri River and at St. Paul and St. Clair & Comapny at Cedar Rapids were not made parties, nor were the Minnesota Railroad & Warehouse Commissioners made parties to the action, but each of these appeared and on application were permitted to intervene and were made parties.

The issue as to whether the 23½ cent rate on live stock from Missouri River points and the rate from South St. Paul were in themselves unreasonable or relatively unreasonable compared with the rates on the product of live stock, was one mainly between the complainant, the Interstate Commerce Commission and the comman carriers, defendant. The contention of the interveners was that the rates into South St. Paul intermediate between Chicago and South St. Paul and the rates from Iowa and Missouri into Sioux City, South Omaha, St. Joseph and Kansas City were properly adjusted

to the through rate of 23½ cents on live stock from Missouri River points and to the through rate from South St. Paul, and in fact that the adjustment was so manifestly favorable to Chicago as to constitute an unjust and unfair discrimination in favor of Chicago, and that a lowering of the through rates would work a dislocation of the adjustment of the rates tributary to South St. Paul and Missouri River points. The contention of the interior packers at Cedar Rapids was that similar unjust discrimination existed in favor of Chicago and against them.

The relief asked for by the interveners through their petitions of intervention was that if the through live stock rate should be ordered lowered by the Court, or if the railroad companies should in compiying with any order or decree made by the Court, reduce the live stock rate from Missouri River and intermediate points to Chicago, then that corresponding reductions be decreed to be made on rates from Missouri and Iowa points into Missouri River points and from points intermediate between South St. Paul and Chicago into South St. Paul wherever the rates were interstate rates. The interior packers at Cedar Rapids prayed for similar relief.

The opinion of the Commission upon this branch of the controversy contained the following conclusion as shown on pages 46 and 47 of the printed record:

> "The defendants operating between South St. Paul and Chicago contended that if the rates on live stock from points in Minnesota intermediate between South St. Paul and Chicago are reduced to Chicago, the Minnesota Commission will make corresponding reductions from such Minnesota points to South St. Paul. This contention was supported by the testimony of a member of that Commission, who stated that in his opinion the present adjustment of live stock rates, as between South St. Paul and

Chicago is fair, and that, therefore, any reduction to Chicago, unless followed by a corresponding reduction to South St. Paul, would make the relation unequal. If such relation is now just (concerning which we express no opinion) and in complying with any order that may be made in this case, these defendants reduce the rates to Chicago, corresponding reductions to South St. Paul should, of course, be made. This also applies to similar contentions of the interveners representing interests at points on the Missouri River."

The Circuit Court having found against the Interstate Commerce Commission and dismissed its bill, no mention is made in the opinion as to the position of the interveners in the case nor of their interest in the questions litigated.

The Union Stock Yards Company of Omaha (Limited) operating stock yards in South Omaha makes the following claims under the pleadings and evidence:

1. That the rates on live stock to Missouri River points from points in Missouri and Iowa are properly and fairly adjusted to the through rate of 23½ cents from the Missouri River and intermediate points to Chicago. In fact that the adjustment constitutes a favorable discrimination to Chicago.

2. That under this adjustment live stock moves on these rates to Chicago and Missouri River points from territory east of the Missouri River from 100 to 150 miles, and in which the 23½ cent rate is applied, showing the adjustment is proper and fair, if indeed not favorable to Chicago.

3. That a reduction of the 23½ cent rate will work a dislocation of this adjustment between this through rate and rates from points in Iowa and Missouri into Missouri River points to the disadvantage of the business of stock yard companies doing business on the Missouri River and to those localities as well as to persons doing business there, including the

shippers of live stock from the points mentioned in Iowa and Missouri tributary to South Omaha.

4. That if decree should be ordered herein reducing the 23½ cent live stock rate mentioned, corresponding reductions should be ordered of all live stock rates from Iowa and Missouri points into South Omaha and other Missouri River points.

The Evidence and Argument Sustaining These Propositions.

That these rates mentioned above are not only more than fairly adjusted as to Chicago's interest but that facilities in the way of trains and train schedules for shipping to Chicago from the Missouri River and intermediate points in Iowa and Missouri are more favorable than those afforded for shipment to Missouri River points, see the testimony of Mr. Crosby, Freight Traffic Manager of the Chicago, Burlington & Quincy Railway Company, Vol. 1, pages 314-318.

See also testimony of Mark D. Flower, President and General Manager of the St. Paul Union Stock Yards Company, as to effect of reduction of through rate and arrangement of trains and train schedules favorable to Chicago, Vol. 1, pages 774-778.

That all railroads entering Council Bluffs have running arrangements over the Union Pacific bridge and its tracks to South Omaha and that rates are made from Western Iowa to South Omaha, see the testimony of J. H. Highland, 3rd Vice-President of the Chicago, Milwaukee & St. Paul Ry. Company, Vol. 1, pages 521-525.

Exhibit 3 to the testimony of Henry Gower, Assistant Freight Traffic Manager of the Chicago, Rock Island & Pacific Ry. Co., shows the rate on cattle and hogs on that road to

Chicago from each intermediate point between St. Paul and Missouri River points on one hand and to Chicago on the other. Vol. 1, pages 726-749.

The testimony of Mr. McCulloch, 3rd Vice-President of the Chicago & Northwestern Ry. Co. (Vol. 1, page 948), shows that the rates from Iowa points into South Omaha and other Missouri River points are now adjusted so as to work discrimination in favor of Chicago and that a reduction of the 23½ cent rate would make them still more favorable to Chicago. One of the exhibits Mr. McCulloch refers to is found at top of page 943, Vol. 1. This table shows the rate from stations east of South Omaha to Chicago and to South Omaha. The distances from four stations to Chicago are given with the rate to Chicago; the distances from the same stations to South Omaha and the rate to South Omaha is given. An inspection of this testimony will show how the rates are adjusted in favor of Chicago.

Mr. McCulloch says on page 956, Vol. 1:

"If the live stock tariff on our road (C. & N. W. Ry.) for the remaining three months of this year continues as it has in the past nine months we will have moved over our road 100,000 cars of live stock. If the live stock continues to follow that channel for the next few months that it has for the last nine months, of those 100,000 cars of live stock, 70,000, or 70 per cent, will be transported to the Union Stock Yards at Chicago, leaving 30 per cent to be moved to St. Paul, Sioux City, South Omaha, Marshalltown, Des Moines and Cedar Rapids to the packing houses at those points, and we are without a single complaint. There are thousands of people who are shipping their live stock over our road on these rates that our Company is charging without a complaint on a single car."

Mr. Stickney, testifying for the defendants (Vol. 1, page

634), shows that about 65 per cent of stock on his road (Chicago Great Western) from the 23½ cent zone go to Chicago and about 35 per cent goes to St. Paul and the Missouri River points.

From this exhibit on page 943, Vol. 1, it is shown that the rate from Missouri Valley, Iowa, to Chicago, a distance of 467 miles, on cattle is 23½ cents and on hogs 23½ cents, while from the same place to South Omaha, a distance of only 27 miles, the rate on cattle is 8.52 cents and on hogs 9.29 cents.

From Dunlap, Iowa, to Chicago, a distance of 441 miles, the rate on cattle and hogs is 23½ cents each, while to South Omaha, a distance of only 54 miles, the cattle rate is 10.49 cents and the hog rate is 10.96 cents.

From Vail, Iowa, a distance of 415 miles from Chicago, the cattle and hog rate is 23½ cents each, while to South Omaha, a distance of only 80 miles, the cattle rate is 11.81 cents and the hog rate is 12.45 cents.

From Glidden, Iowa, to Chicago is 389 miles. The cattle and hog rate is 23½ cents each, while from the same place to South Omaha the cattle rate is 13.13 cents and the hog rate is 13.25 cents.

By reference to the testimony of William A. Gorman, Chief Traffic Clerk for the C., M. & St. P. Ry., commencing on page 967, Vol. 1, of the printed record, the rates tributary to South Omaha, Kansas City, Sioux City and South St. Paul are shown to be favorable to Chicago as compared to rates for similar distances from Chicago in territory tributary to Chicago. Mr. Gorman presented the exhibit found on page 969 of Vol. 1 as part of his testimony. That table sets out the rates from certain stations to Chicago, giving the distance of each station from Chicago, and also sets out the names of stations in Nebraska, Kansas, South Dakota and Minnesota, all about

the same distance from the Missouri River and St. Paul markets. We cite only a few of the rates shown here, commencing with the exhibit page 969.

The first station is Deerfield, Illinois, which is 23 miles from Chicago; the cattle rate is 5½ cents and the hog rate is 6½ cents.

South Bend, Nebraska, is 27.5 miles from South Omaha and the rate on cattle is 7 cents and on hogs 9½ cents.

DeSota, Kansas, is 24 miles from Kansas City and the rate on cattle is 6 cents and on hogs 8 cents.

Elk Point, S. D., is 20.9 miles from Sioux City and the cattle rate is 7.11 cents and the hog rate is 7.33 cents.

Castle Rock, Minn., is 26.1 miles from South St. Paul and the cattle rate is 7½ cents and the hog rate is the same.

Fox Lake is 49.6 miles from Chicago and the cattle rate is 6 cents, while the hog rate is 8 cents.

From Ames, Nebraska, to South Omaha is 49 miles and the cattle rate is 9 cents and the hog rate 12 cents.

Lecompton, Kansas, is 51 miles from Kansas City and the cattle rate is 8 cents and the hog rate 10½ cents.

Gayville, S. D., is 49.8 miles from Sioux City and the cattle rate is 11 cents, the hog rate 13 cents.

Plato, Minnesota, is 51.9 miles from South St. Paul and the cattle rate is 9½ cents, the hog rate the same.

The rates here shown by this table are uniformly higher to the Missouri River points and to South St. Paul than the rates charged for similar distances into Chicago.

Mr. Gorman speaking of these tables in Exhibit 1, commencing on page 969, says:

> "The statement shows the local rates on the main line of the C., M. & St. P. Ry. between St. Paul and Chicago

and on the main line of the C., M. & St. P. Ry. between Omaha and Chicago on cattle and hogs to Chicago for distances from 25 miles to 500 miles at intervals of 25 miles. It also shows the rates for the same distances into South Omaha, Kansas City, Sioux City and South St. Paul.

There are 166 comparisons, and of those 166 comparisons 153 of the rates into South Omaha, Kansas City, Sioux City and South St. Paul are higher than the rates for the same distance into Chicago on cattle and hogs; 13 of the rates into South Omaha, Kansas City, Sioux City and South St. Paul are lower than into Chicago."

The same adjustment of rates and arrangement of train schedules favorable to Chicago exist on all of the railroad common carrier defendants traversing the 23½ cent zone as are shown to exist on the two roads whose rates are referred to in the testimony cited—the Chicago & Northwestern Ry. and the Chicago, Milwaukee & St. Paul Ry.

The importance of the rates from Iowa and Missouri points to Missouri River stock yards and from Missouri River points to points in Iowa is shown by the testimony of Mr. Kenyon, General Manager of the Union Stock Yards Company of Omaha, found on pages 998-1033, Vol. 1.

Especial attention is called to exhibits following page 1016 of his testimony and embracing pages 1016-1022, Vol. 1. This statement shows the origin of all cattle, hogs, sheep, horses and mules received at seven western markets from all points in the United States, viz.: Chicago, Kansas City, Omaha, Sioux City, St. Joseph, St. Louis and St. Paul. Among these facts is shown the number of head of cattle and hogs received at Omaha from Iowa and Missouri points in the 23½ cent zone for the first seven months in 1905 and for all of 1904, all of 1903, all of 1902 and all of 1901.

Mr. Kenyon analyzes this exhibit on pages 991-1000, Vol.

1, and we make special reference to his testimony and that exhibit.

The testimony of Mr. Kenyon and exhibit found on pages 1016-1022 shows the number of cattle and hogs received at these western markets during the time the live stock rate and product rate complained of have been in effect and shows that Chicago has not suffered because of these rates.

An examination of these exhibits and Mr. Kenyon's testimony will show that there was a decrease at the Chicago yards in 1904 over 1903 of 4 per cent in cattle and hogs. This decrease, however, is explained by the Chicago Stock Yards Company in its published report for the year 1904, and this explanation is found on pages 3-9 of that report. The report itself is not printed in the record, but will be found on page 2500 of the record. That part of the report to which we desire to call special attention is as follows:

> "Owing to the long series of strikes at the packing houses during the summer of 1904, the receipts of live stock at the Union Stock Yards for the year show a decrease of 173,301 cattle, 4244 calves, 87,177 hogs and 78,130 sheep, with a general decrease of 16,042 cars in the total receipts, being a loss of about 5 per cent as compared with 1903 and a gain of 4 per cent as compared with 1902. *That above decrease was due entirely to the strike* is shown by the fact that on the horse market, which was not affected by the strike, there was an increase in receipts of 5346 horses." (Page 3 of the report.)
>
> "Receipts of hogs for 1904 show a decrease in numbers, the shortage being 87,177 head, or about 1¼ per cent; also a decrease of 6 lbs. per head in average weight as compared with 1903. The total decrease equaled about 63,000,000 pounds of pork or 285,000 hogs. *The strike was responsible for shortage in number and the scarcity of corn explains shrinkage in weight.*" (Page 9.)

The complaint originally before the Interstate Commerce Commission was that these rates on live stock and product from the 23½ cent zone caused a decrease of receipts at the Chicago yards, but the testimony in this case taken from the Chicago Stock Yards' own reports shows that there has been a decrease in only one year and that is accounted for as shown by the report quoted above. Thus it is shown conclusively that the live stock rate between the Missouri River and intermediate points and Chicago was not responsible for the decrease in 1904.

Mr. Kenyon's testimony and exhibits mentioned will show there has been a general increase in receipts of cattle and hogs at the Chicago Stock Yards during the years mentioned in the exhibits. Whatever discrimination there may be in the live stock rates and in the product rates, the rate on live stock has so far resulted in benefit to Chicago interests as reported by the Live Stock Exchange and the Chicago Stock Yards Company, but the contention and complaint now seems to be not that there is a decrease in receipts of cattle and hogs at Chicago, nor that there is not an increase, *but that the increase is not sufficiently large to satisfy the commission men at Chicago who made the original complaint in this action.*

The Interior Iowa Packers.

The fact that Chicago is favored in all rates with reference to packing house product and live stock is shown in the testimony given on behalf of the interior packers in Iowa by Mr. E. T. Koch, General Traffic Manager for T. M. St. Clair & Company of Cedar Ripds, Iowa, whose testimony is found at page 597, Vol. 1 of the printed record. This shows that St. Clair & Company are engaged in purchasing, not at Cedar Rapids, but at different stations in Iowa and Missouri, hogs, and carrying them at their own expense to Cedar Rapids to

be slaughtered. He shows that the rate on the hogs from the stations where they are compelled to purchase them, added to the product rate from Cedar Rapids to Chicago exceeds the live stock rate and makes a difference in favor of Chicago packers of 3½ cents. His testimony shows that St. Clair & Company are extensive packers of hogs and that rates are so established as to constitute an unjust discrimination against Cedar Rapids and in favor of the City of Chicago.

Mr. Thomas D. Foster, testifying on behalf of defendants, shows the situation of packers at Ottumwa, Iowa. His testimony is found on page 641, Vol. 1, of the printed record.

Effect of Reduction of Rate on Live Stock as Prayed for by the Complainant.

It is most likely that *increased receipts* at Chicago might work to the injury of the live stock raiser and shipper, for the more live stock received in the Chicago market the greater the supply and necessarily the lower the price. According to the testimony of the complainant and many of the other witnesses, the Chicago market controls the price of live stock in the western markets. To give Chicago a monopoly in the live stock market will not result in benefit to the live stock raiser or shipper nor to the public at large. The number of cattle received at Chicago affect the price the owner of the live stock receives, but in no wise affects the price received by the members of the Live Stock Exchange for the services its members render the live stock raiser and shipper in selling live stock on the Chicago market. The commissions received by the members of the Live Stock Exchange always remain the same. These commissions are not affected by any conditions whatever except the rules of the Live Stock Exchange. It is therefore submitted that the benefits resulting to the members of

the Live Stock Exchange would not justify the court in ordering an injunction as prayed in the complaint's bill. The injunction could hardly be based upon such narrow grounds.

But suppose the decree is made against defendants, enjoining them to cease from maintaining the difference between the present rates on live stock and packing house product and dressed meats from the Missouri River points, and St. Paul and the only way for the defendants to cease this discrimination under the circumstances of this case is for them to reduce the rate on live stock say to 20 cents; that reduction was contended for by the complainant before the commission; and suppose that the decree makes no provision about the rates from what is now the 23½ cent zone into the western markets. How will this affect the raiser and shipper of live stock from that zone? Manifestly he will be induced to ship to Chicago, and instead of 70% of the live stock going from this zone to Chicago practically all of the live stock in that zone will go to Chicago. Certainly all those who ship to Chicago on present rates will continue to ship to Chicago on the reduced rates, and just as certain it is that those who have been shipping to Missouri River points on the present adjustment of rates will see in the reduction of rates to Chicago and the maintaining of the present rates to the Missouri River points, inducement to ship to Chicago. We think this is true and will follow as a natural consequence of such a decree, notwithstanding the statement of Mr. Peabody that a reduction of 23½ cent rate would not result in a single additional car of live stock going to Chicago. Mr. Peabody's opinion was based upon the presumption that there was in the zone a certain number of cattle and that they would be moved out of that zone, and that the reduction in the rate could not increase the number of cattle in the zone. But all of the cattle from that zone have not heretofore gone to Chicago; a por-

tion of them, 30%, have gone to the Missouri River points and to St. Paul.

Over three thousand cars of live stock were carried out of this zone to Missouri River points and to St. Paul over the Great Western, according to Mr. Stickney's testimony. Thirty-five hundred cars were carried out of this zone to the same points on the Northwestern road, according to Mr. McCullogh, third vice president Chicago & N. W. R. Co.

The other roads carried perhaps about the same number from their portion of the zone to western markets. So that the number of head represented by the 30% or 35% shipped from this zone to western markets is very large.

To transfer this whole supply to Chicago would naturally increase the receipts at that place to such an extent as to have an effect upon the price of live stock in the Chicago market.

All the testimony shows, and it is a well-known fact, that the price of cattle in the Chicago market is fixed by competition and by the law of supply and demand, and the increasing of the supply by such a large number of cattle in one year would certainly have the effect to lower the general level of prices of live stock in the Chicago yards. The live stock raiser and shipper in the now 23½ cent zone would find prices of his live stock decreasing, but he would save about $7.70 a car in freight. He would have to stand the usual shrinkage, which is greater for a long distance than for a short distance. He would be compelled to be longer away from home on expense than if he went to the nearby market; hence he could not hope to bring home with him any more money than he gets now for his live stock, if ineed he would receive as much; for the people who buy live stock on the Chicago market look first at the number of head, and they are quick to seize on a large supply to press down the price. This, in our judgment, would be

the effect on the interest of raisers and shippers of live stock if the decree ordered a reduction of the 23½ cent rate only and no corresponding reductions were made in the rates into the western markets.

Again, it is admitted that if the price at the Chicago market is 25 cents higher than the price in the western markets a reduction of 3½ cents from Missouri River to Chicago would not justify the live stock shipper in preferring the Chicago market to the Missouri River markets. That is, if the difference in price is only 25 cents, the shipper would get more money by selling to the western market. But we have seen from the testimony that the live stock raiser and shipper in the 23½ cent zone ships 65% to 70% of his cattle to Chicago and that he is induced to make this shipment by reason of sentiment; that is, sentiment accounts for shipping the long distance under the present adjustment of rates.

While there probably is some weight to be given to this statement there is still another reason why the live stock raiser and shipper in the 23½ cent zone ships to Chicago. That reason is found in the excellent facilities offered to him to ship to Chicago, such as the train schedules upon which he can always depend, whereas there is no such inducement offered to ship to the western markets. The Chicago market makes the price not only in that market, but in the western markets. This is the evidence in the case. Then can it be said that it is to the interest of the live stock raiser and shipper to increase the number of live stock on the Chicago market? By increasing the supply he necessarily lowers the general level of prices. As long as Chicago controls the price, why not withhold some of the supply and thereby put up the price for the benefit of the raiser and shipper of live stock? *This case is a proceeding paraded as being in the interest of the live stock raiser and shipper, and has for its object to increase the num-*

ber of live stock received at a market which controls the price of live stock in all the other markets, and which will result in lowering the price at the controlling point, and thereby the price at all other markets from St. Louis to St. Paul at the same time.

As an economic proposition affecting all owners and shippers of live stock in the west, and for that matter in the country, this is most novel.

It must be plain that this action is not prosecuted in the interest of the live stock owner and shipper, and that it will not, if judgment should be entered as prayed by complainant, result in his benefit, but will benefit only the Chicago Live Stock Exchange, the Chicago stock yards and the buyers on the Chicago market.

If this is a correct conclusion then the live stock owners and shippers would find little consolation in the fact that they had succeeded in making the rates on product as high as the rate on live stock. Competition between the live animal and the product of the live animal would be on a fair basis as to each article, according to the theory of the plaintiff in this case, and the live stock raisers and shippers would be getting less for their stock than they get now. *The members of the Live Stock Exchange would be getting more money.* This would be a very satisfactory result to some people but not to the raisers and shippers of live stock. So if this matter is looked at in the proper way we submit the conclusion must be reached that on the present adjustment of rates, the extraordinary favorable facilities offered to shippers to Chicago from the 23½ cent zone is such a discrimination in favor of Chicago that the difference between the live stock rate and the product rate of 3½ cents is completely wiped out and is not in any sense a discrimination in favor of the western markets or against the live stock owner.

There is not by the adjustment, when these facilities are considered, any undue or unjust discrimination given to the owner of product over the owner of the live animal. Mr. Tomlinson, testifying for complainant, said one result of the difference in rates between live stock and product was to enable the western packer to bid barely enough to prevent the owner of live stock from shipping to Chicago. If this is true then the live stock owner gets some benefits from this difference in rates. But if the rates are put on the prayed for basis then presumably the packer in the western market will not bid up as before and in such case the owner would not get as good a price as formerly. So that we would have prices of live stock falling at both the eastern and western markets.

This Court and the Circuit Court Has Power to Order a Decree That Will Protect the Interveners if the Judgment of the Circuit Court Should be Reversed.

If the 23½ cent rate should be reduced and the local rates into the Missouri River points and South St. Paul should remain as they are, more cattle would move from the 23½ cent zone into the Chicago market, but if there should be proportionate reductions made of the rates into the western markets then it is presumed that the live stock would move out of this 23½ cent zone to Chicago and to the Missouri River points in the same proportion that it now moves, for the adjustment of the rates would be the same as they are now. This fact would not accomplish the result intended by the prosecution of this suit, but would really defeat it, and this is the reason complainant's counsel do not join with the interveners in praying for such relative reductions.

The complainant's counsel contended below that the cir-

cuit court has no authority to make such an order, because they contend that the court can only determine whether the order of the Commission can be enforced in the words and terms it was made by the Commission. We have pointed out that the interveners were parties to the proceeding before the commission and the protection of their rights was provided for in the opinion, and we think this court can properly consider them as parties to this proceeding and the order as properly potecting them and providing for reductions in their favor in case the reduction is made as to the 23½ cent rate.

We do not think that it is necessary for the court to determine that in order to protect the interveners there must be a modification of the order. The order certainly is broad enough to require the defendants to cease the discrimination complained of and found undue and unreasonable by the Commission, and broad enough to justify the protection of the interests of the Missouri River points and South St. Paul if this court agrees with the finding of the Commission. But if the court should be of the opinion that the order is not such as we claim it to be, still we contend that the court can modify the order and make such an order herein as will protect the Missouri River points and South St. Paul wherever the rates are interstate rates.

The act to further regulate commerce with foreign nations and among the states was passed February 19th, 1903. Section 2 of that act reads as follows:

> "That in any proceeding for the enforcement of the provision of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any Circuit Court of the United States, it shall be lawful to include as parties in addition to the carriers, all persons interested in or affected by the rate, regulation,

or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

There was cited by complainants counsel in the lower court on the oral argument the opinion in the case of *Interstate Commerce Commission vs. Lake Shore & M. S. Ry. Company, et al.*, decided in the Circuit Court for the Northern District of Ohio, January 27th, 1905, and found in the 134 Federal Reporter at page 942.

We submit that what was decided in that case was clearly stated in the head notes to the case:

"That in a proceeding in the Circuit Court under section 16 of the Interstate Commerce Act to enforce an order of the Interstate Commerce Commission, the court has no power to amend or modify such order or to sever from the remainder a part which is illegal, but must enforce the same, if at all, in its entirety as made by the Commission."

This is simply a construction of the Act to Regulate Commerce, and nowhere in the opinion was section 2 of the Act of February 19th, 1903, referred to. Certainly the provisions of the act quoted above gives this court plenary power to make such order in the premises as shall be right and proper, and so as to protect the interest of all the parties to be affected by the order, and especially those parties who are before the court.

We have no doubt that section 2 quoted was enacted for the very reason that the Federal courts had decided the question just as was decided in the case cited and was enacted for the purpose of conferring upon the courts ample authority to make such orders as could upon the evidence be considered right and proper. If that was not the intention of Congress by

the enactment of section 2 it is difficult to understand why that section was inserted. It is certain that the court deciding the case heretofore referred to did not refer to setcion 2 of the act of February 19, 1903, and it cannot be contended that the language of that section has been construed by that decision. We think in view of the language of that act this court has full power to make such order as will protect the interest of the interveners in this case.

The Interests to be Affected by a Disturbance of the Present Rates as Prayed for by the Complainants.

This suit is an attempt to make the intesests of six or seven hundred men organized as the Chicago Live Stock Exchange without capital, outweigh the interests of the following:

All western stock yards on the Missouri River and at South St. Paul.

All markets on the Missouri River and at South St. Paul.

The interests of more than 250,000 people directly supported through employment of heads of families at those markets.

All the packing industries located there.

The farmer and stock raiser in the Missouri and Trans-Missouri country as well as at South St. Paul and territory south and west of South St. Paul and tributary to that place.

In determining what the proper decision of this contention shall be we think the court should first look at the parties to the contention, the interest they represent and how they will be affected by the final judgment; the zone in which the disturbance will be made by an order or judgment of this court

and how the order will finally affect the public. We therefore invite the court's attention to the Live Stock Exchange which is the real complainant in this case, it having been the complainant before the Interstate Commerce Commission upon whose complaint the order in this case was made.

This Exchange is a voluntary association of six or seven hundred men without capital stock, and having as an association no assets whatever. It was formed for the declared purpose, as shown by its Articles of Association, "To establish and maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to provide for the speedy adjustment of all business disputes between its members; to facilitate the receiving and distributing of live stock, as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits."

It is under this wording of their Articles of Association that they pretend to act in making the complaint before the Interstate Commerce Commission, but it is submitted that this Association, so far as the evidence in this case shows, is not doing anything to promote uniformity in the customs and usages of merchants, nor to provide for inspection of meat or aiding in the inspection of live stock and meat products. If it is doing anything under the authority thereby conferred in making the complaint it is under the last clause, which authorizes them to do everything to secure to its members the benefits of co-operation. The evidence shows that the only function this Live Stock Exchange, or rather its members, perform in connection with interstate commerce is to act as the agents of others at the stocks yards in Chicago in receiving consignments of live stock from the owners and shippers thereof and selling the same on the market at the rate fixed

by the Exchange of about $12 a car for selling cattle and $6 for selling hogs. These live stock agents, it is admitted, occupy a legitimate place in the carrying on of the commerce in live stock; against them and their proper discharge of their duty within their legitimate sphere we make no contention. We recognize them and their calling as perfectly proper, but we insist that they are simply an incident to the commerce carried on in live stock. They have no interest whatever in the ownership of live stock. We think it was demonstrated on the trial of this case that the members of the Live Stock Exchange are not themselves or any considerable number of them, or even a small part of them, engaged in the raising and shipping of live stock to Chicago market from states other than Illinois.

The Chicago Live Stock Exchange had but one object in filing this complain and that was to increase the number of cattle to be received at the Chicago stock yards. They allege in their complaint that the discrimination complained of was to the disadvantage of the live stock raiser and shipper, but they were not authorized to act for nor was the complaint made in the interest of that class. It is not believed that the live stock raisers and shippers would voluntarily place themselves under the guardianship of the Chicago Live Stock Exchange. Wherever the live stock raisers see any necessity for action they take it in their own name and on their own account. *Stripped of every disguise, this proceeding, so far as the Chicago Live Stock Exchange is concerned, has for its object the increase of commissions for the members of the Live Stock Exchange, by forcing, through a reduction of rates, a greater number of cattle to be shipped to the stock yards in Chicago.* We think what we have said in regard to this Chicago Live Stock Exchange and its members corrrectly sets

out their interest in the matter and how any order made as prayed for by them would affect them and their interests.

On the other hand are the railroad companies who have introduced a large amount of testimony in the case showing the cost of carrying live stock as compared with the cost of carrying product, and containing a vast number of facts incidental to the question of freight rates generally. It is admitted that these railway carriers have a great interest in the order to be made in this case, and that they will be affected to the extent of whatever reduction in the live stock rate shall be made by them in complying with any order of the court in adjusting their rates from the Missouri River and intermediate points to Chicago.

To what extent any such reduction would amount to in money we have no means of approximating, but it is to be presumed the amount would be quite large, and they are vitally interested in protecting their interests in the contention.

The live stock raisers and shippers in the zone in which it is sought to make disturbance of rates and change the live stock rates would be affected, individually, in very small amounts, but in the aggregate the amount would be equal to the reduction made in the revenue of the carriers. We must therefore consider whether it is right, in view of all the testimony, as to whether this live stock rate is too high or too low, in determining whether the small amount per car which the claimed reduction would amount to shall be taken from the railroad companies and delivered over in small amounts to the large number of live stock raisers and shippers in the zone sought to be disturbed as to the rates.

Another factor to be considered is the public and the market towns on the Missouri River and at St. Paul. These market towns are the home and nearby markets for all the

live stock raisers in the Missouri Valley and the territory west of there, and St. Paul and the territory west of that place.

We do not mean to claim that it is necessary to look only at how the packing industries at these market towns will be in and of themselves affected financially but how the territory tributary to these points will be affected as a public depending upon these markets for marketing live stock in competition with other live stock markets such as Chicago. These large industries on the Missouri River have been built up at an immense cost as we will point out further on, but if this were the only interest to be affected it might not be entitled to greater consideration than the other interests. What we contend is that the market towns which the people have a right to, are to be maintained in the interests of the public. This is what we think Commissioner Knapp had in mind when he wrote his protesting concurrence to the order made by the Commission wherein he said that *it was not altogether clear to him that any order which the Commission had authority to make would likely on the whole, promote the public advantage.*

For the purpose of showing the magnitude of the interests on the Missouri River and at St. Paul we desire to call attention to the exhibit introduced as part of Mr. Kenyon's testimony and known as a general exhibit. This exhibit was compiled from the last United States census. From this testimony it appears that the packing houses at Omaha, Kansas City, St. Joseph, Sioux City and St. Paul have an investment in lands, buildings, etc., amounting to..... $110,362,717
They have salaried officers to the number of.... 6,920
Amount paid for salaries and clerks..... 6,913,158
They employ ordinary wage earners to the number of..... 45,190
They pay a total annual wage of..... 22,101,647

They pay out in miscellaneous expenses	18,079,449
The cost of material used by them is	415,465,961
Value of product	477,366,604
Chicago has invested in buildings, lands, etc.	67,137,569
It has salaried officers to the number of	4,010
It pays in salaries	4,233,994
Number of wage earners employed	25,345
Total wages paid	12,875,676
It has miscellaneous expenses of	13,829,825
Cost of material used	218,241,331
Value of product	256,527,949

From this testimony it appears that the live stock product made on the Missouri River is nearly twice as much as that made in the City of Chicago; that the amount invested in the Missouri River and St. Paul points is about 75 per cent more than is invested in Chicago; that the number of wage earners employed on the Missouri River and St. Paul is nearly twice as great as the number employed in Chicago. We have made no such calculations as to the interior packing points in Iowa and Minnesota, but an investigation in that regard would show that their financial interests are represented by very large amounts.

The officers, clerks and men employed at the western packing plants on the Missouri River and at St. Paul number more than 50,000 men. These men have their homes and their families there. Rating five to a family there will be a total of about 250,000 people directly affected by any injury that is done to the packing industries and the live stock interests at these markets. This represents the number of people who do the labor and carry on the industry and this calculation does not include the capital invested nor the number of people employed in the stock yards at the several packing points on the Missouri River and at St. Paul. Thus a capital of more than $110,000,000, producing a product valued at nearly $500,000,000 annually, and 250,000 people have pitted against

them in this proceeding the claims of six or seven hundred commission men at the stock yards in Chicago who have no capital stock nor money whatever invested in live stock. Not only are these 250,000 people vitally interested in maintaining the home market but every farmer and every stock raiser and every resident or the Missouri Valley and the territory west of there and west of St. Paul are also equally interested in maintaining a market as near their places of residence as possible.

The people of the west where the live stock is raised have certainly as great a right to a nearby market for their live stock as Chicago or any other eastern point has to have the live stock moved on the railroads from the place where it is raised to make a market for live stock in the east. Thus in properly deciding this contention we must consider:

The Chicago Live Stock Exchange and its interest;

The railroad companies and their interest;

The western markets and their interest;

The stock raiser, the farmer, the number of people directly depending on the packing industries in the west and at Chicago;

And the effect any disturbance of rates in the 23½ cent zone will have on each of these interests and finally,

Whether on the whole any order can be made that will "promote the public advantage."

The stock yards on the Missouri River and at South St. Paul represent an investment exceeding in value the investment at the Chicago yards. There was very little slaughtering of live stock carried on in the western markets when these western stock yards were first established. They served more for feeding and resting places for live stock than for any other

purpose, as the live stock was in those times all traveling east. But in time packing plants were established near the western yards, and at once those places became markets for the sale and purchase of live stock, until now the packing industries are represented by the investments of capital, and have depending on them for direct employment the large number of people and the farmers and live stock raisers in the Missouri and Trans-Missouri territory, as has heretofore been pointed out. The stock yards in the west intervened here for the purpose of protecting their interests. But it must be manifest that in doing this they at the same time protect the vast interest represented by the employes at the packing plants and the general stock raising public of the west. The statement made at the hearing that the interveners represented a greater interest than all other parties to this proceeding combined was justified. The disturbance of such a far-reaching industry as the western packing interests on the Missouri River and at St. Paul might result in vast injury to those carrying on those enterprises, but this injury would be small compared to the injury that would result to the stock raising population and the public generally.

The intervener's contention here is not to maintain arbitrarily an acquired status, but, on the contrary, is a contention that natural causes shall not be circumvented so as to prevent the natural development of the western country.

Herein their contention differs from the contention in favor of Chicago and the eastern markets. These latter seek the aid of the government to maintain the *status quo*. The western interests seek to prevent the government's interference with natural causes and their results. Pittsburg, Cincinnati, Indianapolis and Louisville saw this western development transfer the packing industry to Chicago. Chicago must be reconciled to see that same movement transfer the

packing industry to the corn belt among the people who grow the corn, raise and fatten the live stock and sell it in the nearby home market.

While private interests are to be affected by and are represented in this proceeding, these must be subresvient to public intrest and public welfare. Chicago, no doubt, will long remain a live stock market, but it will not, except by circumvention of the natural movement westward, be the only market. The western markets will continue to grow in importance, and they will be in competition with the Chicago market, and this must eventually benefit the stock raiser and the public.

One witness said he was not sure but that it would be better for the people in the stock raising country to become purely an agricultural and grazing community, but we submit that that is carrying the exploitation of the western interests a little too far.

Now if it should appear to the court upon a comprehensive view of the situation that any order that the court may make will simply have the effect to transfer live stock commissions from the live stock agents on the Missouri River to live stock agents at Chicago; or of taking from the carriers a large amount of money and permitting it to be distributed among a large number of people without regard to whether the rate on live stock is too high or too low; or that it will have a tendency to build up one market for all live stock, thereby creating a monopoly which would be to the injury and damage of the owners of live stock; or that will injure the industries now existing on the Missouri River and at St. Paul; or that will injure or damage the people owning and populating the live stock territory; or will generally have the effect of lowering the general level of live stock prices without a corres-

ponding lowering of the prices of meat products, then no order should be made and the bill was properly dismissed. It is upon these considerations we think the case should be disposed of and we most respectfully urge this view upon the attention of the court.

The Interstate Commerce Commission Has Ignored the Development of the Country as a Factor in its Decisions With Reference to the Relation That Should Exist Between Rates on Raw Material and Rates on the Manufactured Product, Especially in Making the Order Upon Which This Suit is Based.

We do not desire in the least to say anything disparaging of the Commission nor to unfairly criticise its decision. The Commission, however, has laid down a principle and followed a theory in regard to the relation that should exist between the rates on raw material and the rates on man..factured product which we think should not be applied in this case.

We respectfully submit that this principle laid down by the ommission with reference to the proper relation that should exist between the rates on raw material and rates on product should not be made a hard and fast rule. The rule while it might be admitted to be proper and to be properly enforced in some cases should be made to bend to the conditions and necessities shown in each case. The Commission, however, seems to have taken a general view of the situation as to the manufacturies in the country at the date of the passage of the act to regulate commerce and the date of the organization of that body under the law, and upon this view conceived it to be the duty of the Commission under the act to maintain the situa-

tion in the country just as they found it. This was conceding that though the population would increase and the center of poulation continually move westward, that development of the country would continue westward, and while the status as to these would certainly change, the status of the manufacturing interests was to remain the same and in the same place as it was before. The Commission, therefore, seeing that the market for the product of the west was in the east and the manufacturers were in the east have applied this principle in regard to rates on raw material and manufactured products to the situation, not in the first place, however, as a protection to the western owner of the raw material, but for the purpose of maintaining the eastern manufacturer.

The Commission shows a solicitude for the eastern packer and not for the western owner of the live animal. The packers east of Chicago invoked the principle in order to maintain themselves in their business as packers against the Chicago packers, that is, to maintain the *status quo* as to themselves. Now that packing industries have been built up on the Missouri River it is proposed by Chicago to invoke the same principle between their interests and the interests on the Missouri River; but in all this there is nothing of benefit to the owner of live stock in the west. This principle was not discovered and declared in any desire to benefit the owner of live stock. It was discovered in the contest between a market in Chicago and the markets east of Chicago. The packer east of Chicago found that product could be made and was being shipped into the market that he served, cheaper than the live animals which he was purchasing at the Chicago market could be and were carried to his packing house in the east. He therefore cast about for some means of changing this for he claimed that he could not under such circumstances compete

with the Chicago packers in the eastern market where he had been selling his product manufactured at his packing plant in the east. The western packer sold cheaper in the eastern markets than the eastern packer could sell. This condition was beneficial to the consumer but that individual does not seem to have been considered by the eastern packer when he was seeking some way and means to so arrange matters that his price might be maintained. Either the matter must be so arranged that the eastern packer could meet the prices of the western packer or that the western packer must come to the price of the eastern packer. So the Interstate Commerce Commission was applied to by the eastern packer, and in all that followed the live stock raiser and the consumer of live stock product were not considered. The contention was not made with a view to benefitting these or either of them. What was sought was to maintain the status as it formerly existed, and it did not matter if the live stock raiser and the consumer of meat products were exploited as a result of this contention. The *finale* of this was the discovery of this principle in the act to regulate commerce with reference to the relation of rates on raw material and manufactured products; the principle was applied so as to maintain the former status, and the result has not been beneficial to the owner of the live animal, and has been detrimental to the consumer of the meat products in the east, so it may be said these two latter individuals have been exploited for the benefit of the eastern packer by maintaining the *status quo*.

The Commission failed to give consideration to facts that ought to be evident. The population and development of the country was not referred to and not considered. The interest and desirability of slaughtering live animals at points as near the place of raising them was not considered; at least no weight was given to any such fact. The right of the stock

raiser in the west to nearby markets was not recognized so as to give them the fair and square deal now admitted to be the due of every one. The fact that market towns are a natural result of the settlement and improvement of the west was a matter of no concern, for had there not been long before this settlement and development market towns established in the east that had served the public there, and had they not a right to continue to serve as market towns in the future? And that, too, though all the animals to be slaughtered in the eastern market were bought out of the west, while not a single animal was brought from the territory within 500 miles of the packing establishments in the east.

Formerly there were many cattle and hogs raised and marketed at these eastern markets but as the country became densely populated around these centers the raising of live animals for slaughtering moved westward and left the eastern markets without animals to slaughter and convert into meat products. The establishment of markets in the west resulted from this movement but under the theory of the Interstate Commerce Commission that the *status quo* must be maintained, the power of the government is to be laid on this commerce and freight rates are to be arranged so as to maintain these eastern packers in their places just as they were maintained before, although the country tributary to them has ceased to be a live stock raising territory.

We submit that the application of this principle with reference to the relative rates on live stock and live stock product to the situation was erroneous and proceeded upon false theories and resulted from a failure to take the proper view that the situation in this country presented. *Instead of considering how it would affect the public or how it would affect the owner of the live stock, how it would tend toward monopoly and to the stifling of the western markets, instead of tak-*

ing into consideration the rights of the people to a home market in their own district and how a deprivation of this right would hamper and impede the prosperity of that district, how upon sanitary and humanitarian grounds it would be better to let the natural results follow the settlement and development of the country, the Commission came right down to the consideration of how the principle would be beneficial to one interest and that interest the eastern packer.

The Census Bureau investigating this subject of live stock and live stock markets and packing industries seems to have taken a broader view of the subject and we reproduce what is said in the Census of 1900 and which was introduced in evidence in this case as follows:

> "It is obvious to even the most casual observer that an industry putting out a product in a single year of over $785,000,000 is of the utmost importance to the people of the United States. It is essentially western in its location and growth. The largest establishments are located in the Mississippi Valley. The states leading in the production of live stock for slaughtering are west of the Mississippi. Indeed, a large part of the industrial welfare of the west may be said to be based upon the live stock industry. The territory devoted to the raising of hogs on a large scale is co-extensive with the corn belt. The corn crop is the foundation upon which depends the live stock industry, and this industry is coming more and more to be a question of corn supply. Of this western stock raising territory the movement is northward and eastward to Chicago, Kansas City, South Omaha, St. Louis, South St. Joseph, and the other great slaughtering centers. The geographical movement of the slaughtering and packing area furnishes a view of the settlement and development of the west. The advantages of transportation facilities possessed by Chicago, backed

with the wide area devoted to stock raising, spreading westward from Lake Michigan to the Rocky Mountains, give that city the lead in this industry. *The tendency, however, is for the slaughtering centers to move still nearer the corn belt.* The rise within recent years of Kansas City and South Omaha, and, more lately, of South St. Joseph, may be traced directly to this factor, and to the improved railroad facilities that follow any enlargement of the territory devoted to corn production. Another comparatively new development is the extension of the feeding in fattening operations for market. The conversion of the surplus corn into beef, pork and mutton, yields a large profit to the feeder." (Vol. 10, designated "Manufacturers," part 3, page 417, United States Census for 1900.)

Here is a recognition of the facts that we contend for by one of the highest governmental authorities, and that authority specially appointed for the purpose of investigating such matters. This authority recognizes that in the natural development of the country the slaughtering indusry will be near the corn belt, and points to the fact that these industries are being located west of Chicago. Progress will continue westward not in opposition to the laws of trade and competition in the open market, but naturally and in harmony with the laws of commerce. No one is damaged by it nor is his property injured by it, and the public generally is benefitted by it.

We have not dealt with the question of cost nor with the technical and expert testimony. We appreciate the value of that evidence as furnishing information entirely proper to be considered. It will no doubt serve to avoid many errors that otherwise might be fallen into. Aside from such use the great volume of evidence introduced will serve no useful purpose. The case cannot be decided upon such testimony. The ques-

tion of transportation rates is too big to be decided upon such facts. Transportation questions vitally affect the public. It will not do to let the common carriers and their customers in contention among themselves control the question of rates, for the public is the great interest to be subserved. The public eventually pays the transportation rates and the cost and profit on all aricles carried.

Respectfully submitted,

FRANK T. RANSOM,

Solicitor for Union Stock Yards of Omaha (Limited).

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Supreme Court of the United States.

OCTOBER TERM, 1906.

352.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, ET AL.,
Respondents.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

ANALYSIS OF THE TESTIMONY.

The appellant Interstate Commerce Commission brought two actions in the United States Circuit Court for the Eastern Division of the Northern District of Illinois against sundry railroad companies whose lines of railway run from Chicago southwest and west to the Missouri River, and northwest to St. Paul. One of these causes was brought to en-

force an order of the said Commission dated January 7th, 1905, made pursuant to a report in writing filed on said date, in which it was found that the "relation of rates maintained and enforced by the defendants, * * * whereby their rates for transportation are higher upon live cattle and live hogs than upon the dressed or prepared products of cattle and hogs on shipments thereof to Chicago in the state of Illinois, from points on the Missouri River, Sioux City in the State of Iowa to Kansas City in the state of Missouri, inclusive, and from South St. Paul in the state of Minnesota, or from points in the territory between the Missouri River or South St. Paul and Chicago constitutes wrongful prejudice and discrimination in violation of the provisions of the Act to Regulate Commerce." The order to desist from the maintenance of said rates or relation of rates having been disregarded, suit was brought by the Commission to compel observance of said order. The report and order of the Commission will be found set forth in full in the transcript of the record, Volume 1, pages 28 to 49 inclusive. This report and order of the Commission was made pursuant to a complaint filed with the Commission by the Chicago Livestock Exchange, an association of commission merchants in Chicago, which association complained that the Chicago market in livestock was being unduly discriminated against by reason of the fact that lower rates obtained from the Missouri River and South St. Paul to Chicago upon packing

house products and fresh meat than upon livestock, by reason of which it was asserted, livestock was diverted to markets along the Missouri River and to South St. Paul, which should go through to Chicago. It was further set forth in the complaint that the rates upon livestock were unreasonable in and of themselves, so that there was presented to the Commission the question as to whether the said rates violated Section 1 of the Interstate Commerce Act by reason of being unreasonably high and also whether they were in violation of Section 3 of the Act, because of the alleged undue prejudice and discrimination in favor of the product of livestock. A perusal of the report will show that the ruling was against the carriers upon the *latter ground only*, but in its petition for the enforcement of its order the Commission alleges in subdivision 9, (see transcript, pgs. 7 and 8), not only that the relation maintained by the defendants between the rates on live cattle and on live hogs on the one hand, and on the dressed or prepared products of such cattle and hogs on the other hand, and the fact that the rates on the former are higher than on the latter creates an undue and unreasonable prejudice, and operates as an unjust discrimination, but also says "and further results in unjust and unreasonable rate charges on live cattle and live hogs in violation of Section 1 of said Act"; that is, in spite of the fact that when there was presented to the Commission a direct issue as to the reasonableness of the rate, and it, after a full hearing, failed to find that the rate was per se un-

reasonable, but only that it was discriminatory as compared with the products of livestock, still when it comes into court to enforce its own order based upon such findings it alleges that the rate is unreasonable in and of itself. The Chicago Great Western Railway Company answered this petition, and after certain formal allegations and denials averred that the rates for the transportation of live cattle and hogs from Missouri River points and intermediate points and from South St. Paul and intermediate points to Chicago, were, at the time of the filing of the complaint, and at all times since, had been very low, and should not be reduced, and that no complaint as to the same had at any time been made by a shipper; and second, that the rates charged for the transportation of dressed or prepared products of cattle and hogs on shipments thereof to Chicago from points on the Missouri River, and from South St. Paul in the state of Minnesota, or from points in the territory between the Missouri River and South St. Paul and Chicago, which were covered by the order of the Commission, were and have been very low, but that the said rates were forced by extreme competitive conditions existing at said Missouri River points and said South St. Paul in respect to the transportation of such products, and were made in order to meet rates put in force by its competitors in the transportation of such products. It was further alleged in the answer that the effect of the order of the Commission seeking to compel the defendant to make the same rate or charge for the transportation of such pro-

ducts, would be to compel a lowering of the rates and charges for transportation of live cattle and live hogs, so that it was equivalent to an order directing the defendant to lower its rates and charges on live cattle and hogs, although the same were and had been at all times extremely low, and had not been made the subject of complaint by any shipper. (See transcript, pgs. 53, 54). It was further alleged that the transportation of the dressed products of cattle and hogs from Missouri River points to Chicago and points east of Chicago was, at the time of the filing of the complaint, the subject of very strong and controlling competition, not only between the railroads leading to Chicago, but between such roads and the railroads leading to the Gulf of Mexico to the lake ports and other markets; and it was further averred that at the time of filing the complaint there were in existence, and ever since have been in existence, proportional rates on livestock originating west of the Missouri River and moving to Chicago and the east which were no higher than the rates on the products of livestock, and that substantially all of the live cattle and hogs shipped from the Missouri River to Chicago and points east of Chicago are shipped on such proportional rates. (Transcript, pg. 54). It was also alleged in the answer that by reason of the fact that the rates on livestock are not unreasonably high and cannot be reduced without making the same unremunerative, and in view of the existing competitive conditions creating the rates on the products, that the order of the Commission could

not be complied with without forcing the defendant to transport livestock at rates which would be so low as to deprive the defendant of its property without due process of law in violation of the Constitution. (Transcript, pg. 55). The answer also averred the fact to be that Kansas City and St. Joseph in the state of Missouri, Omaha and South Omaha in the state of Nebraska, Sioux City in the state of Iowa, and St. Paul in the state of Minnesota, and other points in the general territory covered by the complaint, had become large market towns, and the natural markets for a great part of the livestock raised in the states west of the Missouri river and in the country around about and adjacent to said towns; that large stockyards and packing houses for the killing and dressing of meats and the manufacture of other products out of cattle and hogs had grown up at such places, furnished with all the facilities required for the sale and handling of cattle and hogs, and that the growth and development of such market towns was of great value and advantage to stock growers throughout the territory in question, furnishing them a near market for their livestock, as compared with the disadvantage of shipping their livestock to Chicago and more distant markets, and that those market towns have substantially as good railroad facilities as Chicago, with railroads extending to the Gulf of Mexico, and to the lake ports, as well as to other markets through St. Louis and Chicago, whereby there had grown up and developed at each of said points a home market

for the handling and sale of livestock, from which the country west of the Missouri river and around and adjacent to said cities had derived very great advantages. (Transcript, p. 55.) It was further alleged that it was for the advantage of the west to maintain these other markets, and that the only persons complaining were those constituting a combination and association under the name of the Chicago Livestock Exchange, who were mere brokers, and had no interest in the subject matter, except in the commissions exacted by them for the sale of such cattle and hogs on the Chicago market; while on the other hand, stock growers and all persons interested in the maintenance and development of the said market towns, and in the growth of home markets throughout the territory, were protesting against any change being made in the relation between said rates; and, in conclusion, it was averred that the conditions which surrounded the transportation of live cattle and hogs differ so materially from the conditions surrounding the transportation of dressed products of such cattle and hogs that the rates and charges for transportation thereof should not be compared one with the other, nor should the rates and charges for the transportation of the one be made the basis of the rates and charges for the transportation af the other. (Transcript, p. 56.) The other defendants interposed similar answers, and also alleged (see answer C. St. P. M. & O. Ry. Co., Transcript, p. 61), that on or about the 8th of August, 1902, one of the competitors

of said defendant entered into a contract with certain shippers handling and controlling the shipment of the dressed or prepared products of cattle and hogs from said Missouri river points to Chicago for a long term of years, by which it agreed to carry during said term said dressed or prepared products of cattle and hogs from said Missouri river points to Chicago for a rate of 20 cents per hundred pounds, and said defendant, in order to obtain any portion of said traffic, and to perform the services demanded of it by its customers in respect to such traffic, was compelled to put in force similar rates upon such products between said points, or desist entirely from the carriage thereof from said Missouri river points to the city of Chicago; that the putting in force, therefore, of said rates on said products by the defendant was and is caused and is the result of conditions wholly beyond the control of said defendant. It was further alleged that it would not be possible to establish such parity between its charges for the transportation of live cattle and live hogs on the one hand, and its charges for the transportation of the said products of such cattle and hogs on the other hand, as it was ordered to do by the Interstate Commerce Commission, except by the lowering of its rates and charges between said points for the transportation of live cattle and live hogs; and it was further alleged that, so long as its rates and charges for the transportation of live cattle and live hogs between said points were reasonable, it could not lawfully be compelled to trans-

port and carry said live cattle and live hogs between said points at an unreasonably low rate, because it had been compelled by force of the competition aforesaid, to carry the dressed products of such cattle and hogs between said points, in order to meet said competitive rates on said dressed products of said livestock, at a lower rate than the rate and charge exacted by it for the transportatian of said live cattle and live hogs, and undue prejudice and disadvantage was denied. It is unnecessary to call attention specifically to the answers of the other carriers, as they are in substance the same as the answer of the Chicago, St. Paul, Minneapolis & Omaha Ry. Co., to which reference has just been made. The contract to carry the products of livestock for a period of years, referred to in said answer as having been made by one of the competitors of the Omaha road, was made by the defendant Chicago Great Western Railway Company, and was brought about by stress of competition, as is alleged in the answer of said Chicago Great Western Ry. Company, and as was developed in the proof to which we will hereafter call attention. From this brief reference to the pleadings it will be seen that in the first case here under consideration, the question to be decided is as to whether the order of the commission, above referred to, shall be enforced either by reason of the fact that the rate on live cattle and live hogs between the points mentioned is unreasonably high per se (although, as we have shown, the commission in its report and order did

not find the facts to be as alleged by it in its petition for the enforcement of the order in that regard); and, second, whether, by reason of the rate on livestock being higher than the rate on the product either that traffic or the Chicago market are subject to undue prejudice or discrimination.

In addition to the railroad defendants, certain other parties were permitted to intervene and join with the defendants in opposing the granting of the relief prayed for, to-wit, the Union Stockyards Co. of Omaha, Ltd., whose intervening petition appears at pages 155 to 159; T. M. Sinclair & Co., Ltd., petition, pages 160 to 161; St. Joseph Stockyards Co., petition, pages 162 to 165; St. Paul Union Stockyards Co., petition, pages 166 to 168; Sioux City Stockyards Co., petition, pages 169 to 172; and the Railroad and Warehouse Commissioners of the state of Minnesota, petition, pages 172 to 177. This latter petition, after setting forth the provisions of the Minnesota statutes creating such commission and defining its powers, and stating that it had also appeared at the hearing before the Interstate Commerce Commission resulting in the order in controversy, denied that the rates in question created an undue and unreasonable prejudice, and operated as an unjust discriminatian in violation of section 2 and 3 of the Act to Regulate Commerce, or otherwise, and denied that said charges resulted in unjust and unreasonable rate charges on live cattle and live hogs, in violation of section 1 of said Act to Regulate Commerce, whether as alleged in the complaint or otherwise; and further alleged, among other things, that stock

growers and other persons interested in the maintenance and development of South St. Paul, and interested in the growth of home markets throughout all the said territory, had protested and were protesting, and on their behalf the said railroad commission protested against any change being made in the relation between the said rates upon livestock and upon the product thereof.

In addition to the suit to enforce the order of the commission, another action was brought by the Interstate Commerce Commission, under Section 3 of the Elkins Act, so called, in which latter suit the issues raised were substantially the same, and by order of court the two suits were consolidated and tried together. As will be seen by the record, the testimony presented was voluminous. The court, after giving full consideration to the same, filed an elaborate opinion, which is inserted in the transcript of the record between pages 176 and 177 thereof, an inspection of which will show that the court found all the issues in favor of the defendants, and dismissed the suits, deciding first that the rates complained of were in and of themselves reasonable and just; and, second, that neither by reason of the rates in force upon packing house products and fresh meats, or otherwise, did the said rates result in undue prejudice or discrimination against said other traffic, or against the Chicago market. For the convenience af this court, it is proposed to analyze the testimony as briefly as possible, for the purpose of demonstrating that the conclusions of the court were justified by the testimony.

FIRST, THAT THE RATES IN FORCE UPON LIVESTOCK ARE NOT UNREASONABLY HIGH PER SE.

In spite of the allegation in the complaint to the effect that the said rates are unreasonable, it is interesting to observe that the Commission used the following language in its report: "Complainant also introduced considerable evidence tending to show that the rates exacted by defendants for transporting livestock to Chicago from points in the states of Iowa, Missouri, Wisconsin and Minnesota, are unreasonable per se, but the testimony upon that point is unsatisfactory, and we do not feel justified in making a finding in relation thereto." The larger part of the testimony was addressed to shipments from the Missouri river and intermediate points to Chicago, owing to the fact that the movement of that class of freight is much heavier from Missouri river points than from St. Paul and the territory beyond. Mr. Stickney, the president of the Chicago Great Western Company, explains in his testimony, at pages 622 and 623, that the rate of 23½c per hundred pounds upon livestock from the Missouri river to Chicago, should not be used either for the purpose of comparison or in determining whether rates at present are unreasonably high, for the reason that the cattle and hogs that move from the points along the Missouri river to Chicago originate beyond the river, and are brought to the Missouri river gateway by the different lines of road reaching out to the west, and railways like the Chicago Great West-

ern Railway, the Chicago, Milwaukee & St. Paul, the Illinois Central and the Chicago & Alton, which terminate at the river, are necessarily obliged to accept for the transportation of livestock through to Chicago, a proportion of the through rate from the western points to Chicago. This is what is commonly known as a proportional rate. It is a matter of common knowledge that all railroad rates must include expenses of two terminals. This is so, whether the haul is long or short, and that accounts for the fact that the short haul is more expensive per ton per mile than the long haul. The terminal facilities have to be furnished in any event. Starting with that proposition, Mr. Stickney explains, at page 622, how the rates are made up, including the proportional rates before mentioned. We quote from his testimony:

> "For exemple, from Gretna, a station on the Chicago Great Western road, 26 miles west af Chicago, the nearest station from which any livestock was shipped in the year 1905, the rate on cattle is 6½c to Chicago. This rate is gradually built up until it reaches 23½c at Council Bluffs, on the Missouri river, 500 miles west of Chicago. * * * Then this 23½c rate is gradually built up on the Union Pacific road, to, say, Elkhorn, Nebraska, 28 miles west of the river, where the rate to Chicago is 27½c. As the Union Pacific has no road east of the river, it presents the problem of how the Union Pacific can ship livestock from Elkhorn to Chicago at the rate of 27½c. If the Union Pacific hauls it to the Missouri river, and pays the railway east of the river its local, 23½c rate, it only leaves 4 cents for the use of the Union Pacific facilities at Elkhorn, the use of its cars, and terminal work,

plus the cost of the haul, 28 miles long, which is inadequate.

"On the other hand, if the Union Pacific makes a rate between Elkhorn and Chicago, say 6½c above the 23½c rate from Council Bluffs to Chicago, the tax imposed upon the producer of the cattle at Elkhorn, and upon the producers of cattle in all the territory west of the Missouri river for transporting their products to Chicago, is altogether too much, compared with the tax imposed upon the producer at Council Bluffs and the territory east of the Missouri river, and would not give the producers at Elkhorn, and the territory west the advantage of location to which they are entitled in respect to the distance to market. The point presents the necessity of making through rates from Missouri river markets to Chicago lower than the local rate, to prevent discrimination between producers and localities. In fact, the through rate from the Missouri river to Chicago cannot in a proper sense be regarded as a rate. It is simply a division af the actual or local rate as between the railway companies east and west of the river. All companies east of the river admit the principle that the companies west of the river are entitled to a larger rate in proportion to the distance hauled, and therefore accept a proportion of the rate which is less than their local rates from the Missouri river to Chicago. The rate on the product of live animals from the packing houses on the Missouri river to Chicago is essentially the same. A division as between the railway companies of the rate in effect, allowing to the lines west of the river practically their local rates for bringing to the packing houses the live animals and accepting the balance of the rate for hauling the product to Chicago."

It will, of course, be seen that this proportional rate which the lines east of the Missouri river

receive, varies with the point of origin, so that the entire haul being considered as a unit, and divided between the western lines and the eastern lines at the Missouri river, the further west the stock originates the less will be the proportional accruing to the lines east of the river, as the rate per ton per mile necessarily decreases in order to enable the producer in the far west to reach the market. See Mr. Stickney's testimony, page 623. He testifies that the division of the rate accruing to the lines east of Chicago on cattle ranges from 14c to 22c, and on hogs from 16½ to 22c, while on packing-house products and fresh meats it is 20c. He further explains that if shipments are destined to points east of Chicago, the rate is made on the so-called Mississippi river basis, which reduces the proportional rate from the Missouri river points on all commodities, cattle and hogs, as well as packing house products and fresh meats, about 1½c per hundred weight. It will be seen that the average rate on livestock is 18c per hundred weight on cattle, and 19¼c per hundred weight on hogs, to Chicago; and to points east of Chicago, on cattle 16¼c, and on hogs 17¾c. Mr. Crosby, traffic manager of the C. B. & Q., at page 251, also explains the existence of the proportional rate on livestock originating beyond the Missouri river, and states that Chicago gets the benefit of that. A striking example of a law proportional rate appears in the testimony of Mr. Calkins, assistant general freight agent of the Chicago, Milwaukee & St. Paul Railway Company, at page 545, where

he shows that the rate into St. Paul over his road for a distance of 200 miles is greater than the proportional rate from St. Paul to Chicago, a distance of 400 miles. He further states, on that page, that he has no knowledge of any livestock being moved from South St. Paul (the point at which the St. Paul stockyards are located) on any other basis than the proportional rate, as no livestock originates at that point, but it all comes in from points beyond, and he states that in many cases where the shipments come from somewhat remote points on the northern lines, the proportional received by the lines between St. Paul and Chicago is as low as 13c.

Mr. Ripley, the president of the Atchison, Topeka & Santa Fe Railway Company, testified on cross-examination, at page 1120, that most of the livestock that was carried to Chicago from Kansas City was carried on a proportional rate, and that that proportional rate was considerably less than 20c. In the opinion of the court below, which is inserted between pages 176 and 177, is a table showing the rates on packing house products and fresh meats to Chicago from Missouri river points to be 20c, and from St. Paul, 15 7-10c and 17c, respectively. It appearing from the testimony that livestock moves from Missouri river points to Chicago and from St. Paul to Chicago on the proportional rates, rather than on the local rate; and it further appearing that this proportional rate is less than the rate that is charged and collected upon packing house products and fresh meat, it is clear that

there can be no complaint of any discrimination against livestock moving between these terminal points. Therefore, that question must necessarily be considered as out of the case. The only places from which the 23½c rate complained of applies are points intermediate in the zone over which that rate is spread, which extends about 150 miles east of the Missouri river, and the testimony is overwhelming that the rate from points in that territory upon livestock is already too low. There are certain expenses that are peculiar to the handling of livestock that do not apply to any other class of freight. In the case of shipments from one market town to another, that is, from Missouri river points or South St. Paul to Chicago, the railway companies have to load the stock into the cars at an expense of from 50c to a dollar a car. (See Stickney, p. 628.) If there is a delay in transportation, so that the owner of the cattle loses the market for a day, claims for damages are asserted, which averaged on the Chicago Great Western Railway, during the year 1905, $1.61 per car. (Stickney, p. 628.) The railway company is compelled to clean livestock cars, at an expense of 50c to a dollar per car. (Stickney, p. 629). In hot weather the livestock is sprayed with cold water several times in transit, at an expense of 25c a car. (Stickney, p. 629.) The shipper is entitled to free transportation for one passenger for each two car loads shipped from the point of shipment to Chicago on the train which carries the stock, and a free return ticket on a first-class passenger train, which, esti-

mated at the value of one-half regular rates, would amount to $6.50 per car. (Stickney, p. 629.) It appears by the testimony of all the witness that it has always been the practice to issue this transportation so that the producer of livestock can accompany his shipments to market, and it is safe to say that it is an expense which could not be done away with, and is incident to the business. It is expressly authorized by the section of the Hepburn act relating to passes. All of these unusual elements of expense apply to shipments of livestock from local stations, with the exception of the expense of loading at terminals, as the shipper loads the stock at country stations, but at such points the railway company is obliged to furnish stock pens at which stock is loaded, which are constructed and maintained for no other purpose whatever than the handling of livestock. Mr. Stickney testifies, at page 632, that upon a new line of road which the Great Western recently constructed, these stock pens at country points cost $1,422.04 each, which did not include the cost of paving the floors, which will have to be done later, at an average cost of probably $1,000 each. Applying this average cost to all the stock pens upon the Great Western system, and dividing it into the amount of shipments during the year 1905, would show that there is properly chargeable to this item $2.25 per car. These stock pens have to be cleaned by the railroad company, and stock cars set out practically one at a time to the pens to be loaded, which delays trains and

adds materially to the cost of transportation; that 25c per car would be a low estimate for such special item of expense. (Stickney, p. 632.) Outside of these specific items which we have picked out, Mr. Stickney, in his testimony on pages 623 to 632, makes exhaustive computations to show the actual expense of handling this class of traffic, based largely upon figures taken from the books of the Chicago Great Western Railway Company. We will consider this testimony in another connection later, but it is sufficient to say here that it demonstrates that the rate an livestock complained of in this action is unreasonably low considered by itself.

Mr. Gardner, the general manager of the Chicago & Northwestern Railway Company, on page 324, shows that the special kind af equipment necessary for the transportation of livestock lies idle generally, except during the particular months in the year that livestock is chiefly moved. He also states, on the same page, that out of a total revenue of three million dollars from the livestock traffic, $63,000 was paid back to the shippers on account of damages to stock, and that upon an average $25,000 a year is paid in personal injuries to persons accompanying livestock, who are given free transportation by the companies. He further testifies that on their system there is an investment af $700,000 in stockyards at country stations, and $250,000 in independent tracks necessarily constructed to reach such yards (p. 326). He details very fully the expense of maintaining

these yards, and the items that enter into it. On page 327, he explains the method of construction of stock cars, and the great expense of maintaining them, and the fact that their life is several years shorter than that of the average box car, and that it costs about $35 per car per year on an average to keep freight cars in repair, and about $60 to $65 per year to keep stock cars in repair. He further testifies, on pages 328, 329, that while the shippers load the stock at country stations, the extra time that is put in by railroad men in assisting in such work, including the extra time of the station men, involves an expense of about $2 per car, which was an item not taken into account by Mr. Stickney in his computation. At page 331, he calls attention to another item of expense, referred to by other witnesses, which is that shippers will telegraph in for stock cars to be brought to country stations to be loaded, and, after the cars are sent in, the market in Chicago goes down, and the locomotive and train crew have to return without a load, and when the shipper, some days later, is ready to ship, another full movement of the engine and train crew is necessary to go out and pick out these cars. At page 332 he explains the cost of cleaning the stock cars to be from 50c to $2 a car each trip, and that his company has purchased and maintains two farms near Clinton, Iowa, at which cars are cleaned, and the company is at the expense of hauling them out to that point from Chicago to be cleaned. The Northwestern road also provides drovers' cars,

which cost several hundred dollars more than the ordinary caboose, and the fittings in those cars, such as blankets, mattresses, pillows, and the like, cost $40 or $50, and it also costs about that much more per year to maintain them. At page 333 he testifies that when 800 cars of stock are brought in from the west on Monday morning, which is not unusual, there are from 250 to 260 people who have been transported by the railway company, all of whom receive this transportation to the city and back to their homes, and the aggregate value of such transportation is very great, even if computed at reduced rates. In the case of washouts or wreck, it is necessary to run the cars back to some point where the stock can be watered and fed, and possibly unloaded. (Page 333.) In addition to the ordinary country stockyards, the Northwestern road maintains five or six feed yards, necessitated by the act of congress, and by the custom of doing business. (Page 334.) As to the extra superintendence required in handling the stock runs, see page 334. There is also the expense of bedding the cars with sand or gravel, which Mr. Gardner estimates at a dollar per car. (Page 335.) The expense of picking up any stock train at intermediate stations is twice as great as handling a through train from Missouri river points or St. Paul to Chicago. (Pages 337, 338.) He states that a conservative estimate of the value of free transportation furnished by the Northwestern to persons in charge of live cattle and hogs during the year ended June 30th, 1905, would be about

$200,000. At page 339 is a table showing the number and cost of stockyards and tracks, and the cost of maintaining the same upon the various divisions of the Chicago & Northwestern. At page 380 he speaks of the delays occasioned by the necessity of cleaning cars, which involves to his company an additional investment of $650,000 to $800,000, necessarily tied up in additional cars, which would not be required if it was not essential that they be cleaned. Mr. Gardner testifies, at page 397, that he has never heard any complaint as to the rates on livestock, except from the commission men in Chicago; he has heard no complaints from shippers in Iowa, although he sees them frequently, and knows many of them.

Mr. Keepers, general freight agent of the Illinois Central, testifies (page 399) that the rates on cattle and hogs in controversy are now unreasonably low, for the reason that they do not yield a fair compensation for the service performed; that they would be much higher but for the fact that they are reduced by competition. He filed a table, at page 399, showing the total freight receipts of his road for the year ended June 30th, 1905, and the receipts for the transportation of cattle and hogs, and the loss and damage paid on account of cattle and hogs, and for injury to persons in charge of cattle and hogs, and the total loss and damage claims for all freight, which showed that the losses on account of livestock shipments were about twice as great as the average for the entire freight business of the company.

At pages 401 to 403, he filed Exhibit 3, showing the comparative revenue per car received from livestock and from wheat, corn, pig iron, cast iron pipe, and lumber, agricultural implements, canned goods, and many other commodities, which shows that the livestock traffic is much less profitable per car than the transportation of the representative commodities set forth in said exhibit. At page 407 is an exhibit showing that the revenue per car to Chicago on cattle and hogs is less than the revenue into Kansas City, St. Paul and East St. Louis, from various points situated at a substantially equal distance from the terminus. At pages 409 to 414 Mr. Keepers files another series of comparative tables, showing the low revenue received per car on cattle and hogs, compared with other subjects of transportation.

Mr. J. H. Hiland, third vice president of the Chicago & Milwaukee & St. Paul Ry. Co., in charge of the traffic of that system, was asked, at page 506:

> Q. "I wish you would state, Mr. Hiland, whether the rates on cattle and hogs, set forth in said Exhibit No. 1 (the rates in controversy), and the rates from your intermediate stations to Chicago are just, or unjust, reasonable, or unreasonable, and give your reasons for any opinion you may express?
>
> A. The rates on livestock, in my opinion, do not bear a just proportion in the contribution to the total revenue derived for the transportation of freight carried by the Chicago, Milwaukee & St. Paul Ry. Co., as adjusted between the points mentioned."

On page 508, Mr. Hiland introduced a very instructive table comparing the rates on livestock from intermediate points between the Missouri river and Chicago with the rates on livestock to other markets for like distances. This table shows that the rates are in substantially every instance lower than the rates to other packing centers.

Mr. Peabody, the statistician of the A. T. & S. F. Ry, who called as a witness by the complainant, identified as prepared by him, a table which will be found on pages 1165 and 1166, which showed the low average revenue per car load received for the transportation of cattle and hogs by that company, as compared with practically every other species of traffic, including dressed meats and packing house products. On page 1229, Mr. Peabody explains these tables. On pages 1231 to 1233, Mr. Peabody testifies as follows:

> "Q. Now, as I understand the statistics put in by Mr. Ripley, which were prepared by you, they show that livestock does not begin to pay its proportion of all of the cost of operation, including interest and taxes.
>
> A. Oh, no, by no means. * * *"

Then, having his attention called to certain figures that had been introduced by Mr. Ripley, and explained by him, the testimony proceeded:

> "Q. Do you remember whether livestock pays a small profit over the actual cost of movement, excluding its percentage of operating expenses, and excluding altogether interest and taxes?
>
> A. Are you now referring to livestock from

Kansas City, or to our whole livestock business?

Q. I am referring to the movement that you embraced in that calculation; that is, from Kansas City. * * *

A. From Kansas City it lacks $18.77 of paying the total transportation cost; that is, on the basis of the average cost; $2.56 less that the total operating cost; but shows a margin of $19.29 more than the 55 per cent. of the operating cost, which I estimated as being the movement expense.

Q. Now, then, a carrier, in accepting and carrying livestock from Kansas City to Chicago, would not be moving that traffic at a loss?

A. No.

Q. As compared with the cost of its actual movement?

A. With the cost of its actual movement, no.

Q. But he would be moving at a loss of $2.56 if it was made to pay its full proportion of all operating expenses, is that true?

A. That is on the theory that the cost of handling that, was the average cost of handling all freight. Of course, you cannot apply that to a car of cattle, because that might cost more, or it might cost less; I can't conceive of its costing less than the average; it will cost more than the average to handle cattle; in fact, that is admitted in the case, I believe.

Q. And if the carrier were to charge up against the transportation of a car load of cattle from Kansas City to Chicago not only the total operating expenses, but its proportion of interest and taxes, it would fall $18.77 short of meeting them?

A. It would, yes, sir."

Mr. Tittemore, freight traffic manager of the Minneapolis & St. Louis and the Iowa Central

Railways, testified particularly with reference to the reasonableness of the rates from St. Paul and the Missouri river zone to Chicago. At page 569 he was asked whether the rates on livestock were just and reasonable, and to give his reasons for any opinion he might express. He answered:

> "In my judgment, the rates on livestock from the Missouri river, and particularly from the Missouri river zone, are more than just to the shipper, and are less than the carrier should receive for the service we render. The Minneapolis & St. Louis and Iowa Central Companies do what we call a pick-up business, and I believe that nine-tenths of the traffic is composed of that class of business * * * If you were to refer alone to terminal rates, and handle the business in train loads, which is not the case, the rates might be considered—the present rates might be considered reasonable. In the first place, take it with our roads; we have to provide stockyards, at a considerable expense, to such an extent that at a majority of our country stations it costs us more to provide for the reception and shipment of livestock than it does for the reception and shipment of passengers, if you will, and almost every other kind of freight. One of what I call our six-ten yards, such as is located at Grinnell, Iowa, or at Brighton, Iowa, costs us a little more than $1,200. We provide scales and scale houses; we provide feed troughs and racks; we pave the yards with vitrified paving brick; in many cases we provide windmills, and in some cases use city water. We not only have to shed the yards to withstand summer suns, but also winter snows and winds, and, on the whole, the yards cost us between $1,200 and $1,300; nearer $1,200 than $1,300. The Iowa Central and the M. & St. L., during the past two years, have done considerable work on their stock-

yards, and the Iowa Central expended, during the last two years, approximately $20,000. * * * The M. & St. L. expended approx- $10,000, or approximately $70.00 per yard per annum."

He then proceeds to detail the extra expense of going out on the branches and picking up small loads of two or three car loads of stock. He further says:

"It is my experience that stock trains lose more time at stations, are compelled to make greater speed between stations, and handle less revenue tonnage per train mile than any other class of trains on our railroads."

On pages 570 and 571, he again repeats that the rates on livestock are too low, and that the revenues of the road would be very much increased if, instead of handling livestock, they could haul to market the grain consumed by the stock on the farm.

Mr. Gower, the assistant freight traffic manager of the Chicago, Rock Island & Pacific Railroad, testified as follows (page 720):

"Q. I wish you would state whether the rates on cattle and hogs, set forth in said Exhibit No. 1 (the rates in controversy), are just, or unjust, reasonable, or unreasonable, and state fully the grounds of any opinion you may express?

A. Well, I have testified before the Interstate Commerce Commission several times that I consider the rates on cattle and hogs throughout this western country were too low, and, as these rates from the Missouri river are as low as any rates we have for a similar distance, and the more I hear on the

subject the more I am convinced that our livestock rates are too low. Livestock has various expenses; for instance, it is the most perishable of freight, and it has a great many expenses which are peculiar to it."

At page 724, he testifies:

"Q. In proportion to the service performed, is the net revenue received by railroads for the transportation of cattle and hogs more, or less, than the net revenue received by them for the transportation of ordinary dead freight?"

A. The net revenue, ordinarily, is less on livestock than dead freight, on account of the smaller proportion of pay freight to the gross load."

He follows this with some comparative figures, based upon shipments of other commodities into the same territory, which figures show that, taking into account the pay load, weight of the car and the revenue per car upon different commodities, the earnings per ton are as follows: On class A freight, which covers machinery of all kinds, and certain classes of iron and furniture, $3.20 per ton; 5th class freight, which included heavy articles of merchandise, most canned goods, etc., $3.09 per ton; hard coal, a very low rated article, $1.70 per ton; on east-bound business, butter and eggs, perishable freight like livestock, $3.90 per ton; grain from intermediate points in the zone under consideration, $2.13 per ton; cattle, $1.38 per ton.

The latter, on a 20c basis, would be reduced to $1.18, and hogs, which, on a 23½c basis, produce

$1.11 per ton, would, on a 20c basis, be reduced to 94c.

In view of the uniform testimony as to the extra expenses necessarily incurred in handling livestock, it would seem that these figures are a demonstration that the rates complained of are reasonable in and of themselves, unless the claim should be advanced that all freight rates are altogether too high, and no such suggestion has been made in this case.

Mr. John M. Daly, of the Illinois Central, a witness of large experience in various branches of railroading, testified that the average weight of a car load of livestock, including both cattle and hogs, is about ten tons, as against an average of about 23 tons per car of dead freight, excluding from that the tonnage in dairy freight, game and fish. The average speed at which trains of live cattle and live hogs are moved is about 19 to 20 miles per hour, and the average speed at which cars of dead freight are moved from 10 to 12 miles an hour. (P. 799.) When those figures are placed alongside of the comparative revenue, and are considered in connection with the added items of expense heretofore adverted to, it would not seem as though any argument need be made to show that the rates on livestock are reasonable per se. It is a matter of common knowledge that increased speed of movements entail increased expense; that a light pay load, as compared with a heavy pay load in the same class of cars, involves an added expense in movement. Both these elements are present in

the case under consideration. At page 804, in answer to questions by the court, Mr. Daly testifies that 86% of the livestock cars on his road are returned empty, refrigerator cars usually go back filled, and of box cars about 88% go back loaded with merchandise and other freight, so that in this particular it seems that there is a large item of additional expense in the handling of livestock not entailed in conducting ordinary freight transportation. At pages 805 and 806, Mr. Daly testifies that the total receipts of the Illinois Central in handling livestock from the Missouri and Mississippi river to Chicago was about $433,000; that $14,000 was paid in claims in handling the livestock, and nearly $10,000 for injuries to attendants, making a total of about $24,000, or nearly 6% of the gross receipts; that the total receipts for eastbound dead freight from the same territory during the same year was $920,000, in round figures, and the damages paid on the same about $7,000, or less than 8/10 of one per cent. On page 806, he gives the details as to the cost of stockyards at country stations, and the cost of maintenance of the same. On page 809, he states the cost of cleaning cars from 30c to $1.50 per car, varying at different seasons of the year. At pages 810 and 811, he calls attention to the increased cost of handling livestock by reason of the fact that much the larger percentage moves in the winter, when the rating of locomotives is less by about 26% than in summer, and the expense of keeping the loading tracks to the stockyards is greater on

acount of the snow fall. This work often has to be done at night, entailing extra pay to the men.

Mr. Ripley was called as a witness by the complainant, and, while diagreeing with the defendants' witnesses on certain features of the case, in that part of his cross-examination beginning at page 1127 he admitted very freely the extra expenses of maintaining stockyards, of bedding cars, and carrying the drovers with the cars, and the specially designed cabooses for drovers, damages on account of personal injuries to such drovers, etc. In answer to complainant's counsel, Mr. Ripley testified as follows, at page 1101:

> "There never has been a time when the cattle rates brought anything like their fair proportion of the general expenses of the railroad company in the way of revenue. The cattle rates are a relic of the days when the country was open, and when the cattle could be driven to market quite as cheaply as they could be taken by rail, although not quite so quickly. The result of that has been that from time immemorial ever since railroads were built in this western country, the cattle rates have been low in proportion to the rates on other commodities, and, although conditions have changed, and the country has become cut up into farms, and it is no longer, and has not been possible for many years to drive the cattle, yet it has not been possible to advance the rates, and make them what they should be, as compared with the rates on other commodities."

Considering the testimony to which we have called attention it must be apparent to the court that the learned trial judge was abundantly justified in

finding that the rates upon livestock from the territory in question are reasonable in themselves. His first finding of fact reads as follows:

> "First. That the livestock rates are reasonable in themselves. All livestock from points west, southwest, and northwest of the Missouri River, and St. Paul are shipped on a proportional rate from the Missouri River or St. Paul to Chicago. These rates are equal to or less than the rates on dressed meats and packing-house products between the same points. There can be, and is, no complaint as to such traffic. The local rates from the Missouri River and St. Paul, and from 150 miles east, to Chicago, are as shown in above schedule. These rates gradually decrease, until the Mississippi River is reached, and the average Iowa rate is 21 cents. The great weight of evidence indicates that these rates are at least reasonably low."

We come then to a consideration of the testimony bearing upon the finding by the Interstate Commerce Commission that the rate upon livestock should be no higher than that upon packing house products and dressed meats. It will be unnecessary to repeat the testimony to which we have adverted in discussing the first point as to the reasonableness of the rate, but we will content ourselves with pointingout the showing as to the comparative cost of handling the two classes of traffic, and the other considerations developed in the testimony which resulted in the lower rate upon packing house products and dressed beef than obtains upon livestock.

THE SECOND FINDING OF THE LEARNED TRIAL COURT IS THAT "THE COST OF CARRYING LIVESTOCK IS GREATER THAN THAT OF CARRYING DRESSED MEATS AND PACKING HOUSE PRODUCTS."

We have already pointed out certain of the items of expense in handling livestock that are not involved in the transportation of ordinary dead freight, and will now consider testimony that was directly addressed to the comparative cost of moving the two classes of commodities embraced in this inquiry. In the testimony of Mr. Stickney, beginning on page 623, he makes sundry comparisons and computations based upon the actual movement of these commodities over the Chicago Great Western Railway, from which it appears, (and this applies to the other defendants as well,) that the Railway Company furnishes its own stock cars, leasing from other parties only such cars as may be needed above the number owned by it; the refrigerator cars in which packing house products and dressed meats are transported, however, are leased by the railroad at a rental of one cent per mile, and in addition to that rental the railroad company pays for any injury or damage done to the car by derailment, accident, etc., which during the year 1905, aggregated an additional 1/10 of a cent per mile, so that the total payment made by the railroad for the use of the refrigerator cars and renewals and repairs to the same, was 1-1/10c per mile. The average mileage of the refrigerator cars is approximately 100 miles a day, while the aver-

age mileage of railroad freight cars is about 22 miles per day, and the average mileage of stock cars less than 22 miles per day. The movement of stock is very irregular, even between terminal points, as is shown by the table presented by Mr. Stickney, appearing on page 625, which shows that the movement between South St. Paul and Chicago during the year preceding the trial varied from as low as 17 cars in the month of June to 264 cars in the month of August. At the bottom of page 625 and the top of page 626, the astonishing statement is made that during the year the railway company handled an aggregate of 15,134 cars of livestock, an average distance of 197 miles, being an average of less than 42 cars per day; that it owned 686 stock cars, but nevertheless it was obliged to rent from private car lines sufficient cars to move 54% of its livestock, which means that it was only able to get a movement of 5-8/10 of a mile per day per car. On pages 627 and 628 Mr. Stickney makes a series of computations founded upon the records of his company, which show that the actual cost per freight car mile upon the cars owned by the company was 1.23c for use, depreciation, and repairs, as against the 1.1c paid for the use, depreciation and repairs of refrigerator cars. After making that computation, he gives the damages paid by his company for delays in failing to reach the market, to which we have heretofore called attention, and also the expense of loading the cars of livestock at the stockyards on the Missouri River, being from 50c to $1.00 per car, while the packing house products

and dressed beef are loaded in refrigerator cars by the packing houses without expense to the railway company. The railway company is compelled to clean the livestock cars, while the refrigerator cars are cleaned by their owners. The expense of re-icing the product in refrigerator cars in hot weather is borne by the shipper, but the spraying of livestock is paid by the carrier. No free transportation is furnished to shippers of packing house products. Taking these items into account, we have the table appearing on page 629 of the record, making a total expense with the various items of use of car, damages on account of delay, loading, cleaning cars, icing and spraying, and passenger service, of $16.01 per car on cattle and hogs, and $5.50 per car for packing house products and fresh meat, and as most of the cars of both classes are returned empty, there is properly added the return use of the car and the mileage, making an aggregate of $22.16 for cattle and hogs, and $11 for packing house products and fresh meat. The average rate per hundred, owing to the proportional rate governing from Missouri River points, is 18c on cattle, and 19½c on hogs, as against 20c on the product. The witness then gives the average pay load as 21,513 pounds of cattle, 16,636 pounds of hogs, and the average weight of the Chicago Great Western stock cars as 27,500 pounds; the average pay load of packing house products other than fresh meat is 31,632, and fresh meat 22,414 pounds; the average weight of refrigerator cars, in which they are hauled, including ice, 41,000 pounds, producing a revenue per carload of

cattle $38.72, hogs $32.02, packing house products $63.26, fresh meats $44.82. Adding in the weights of the respective cars and deducting the unequal burdens for the use of the cars, and other items heretofore mentioned, of $22.16 on cattle and hogs, and $11 on packing house products and fresh meat, gives the result of a car of cattle, including the weight of the car and the contents, 49,013 pounds, with a revenue of $16.56 for the haul; and a carload of hogs, including the weight of the car, 44,136 pounds, with a revenue for the haul of $9.86; packing house products, including the car 72,632, with a net revenue for the haul of $52.26, and fresh meat, including the car, 63,414 pounds, and a net revenue of $33.82, so that dividing the net revenue by the number of pounds hauled, it is found that the net revenue per hundred weight on cattle is 3.39c, on hogs 2.24c, and on packing house products 7.19c, on fresh meat 5.3c. This clearly demonstrates that the rates between the terminal points, that is, between the Missouri River points, where the packing houses are located, and Chicago, are now adjusted much more favorably to livestock, if there is any relation whatever between the two, than is proper, as the transportation of packing house products and dressed meat is twice as profitable as is the transportation of livestock. But the witness went on to make a similar computation based upon the local rate of 23½c per hundred upon cattle and hogs in what is known as the Missouri River zone, and which is the only territory in which that rate is collected, and compared the revenue to

the railroad company after deducting these common expenses, with the net revenue received from the transportation of packing house products and dressed meats from the river, which is the traffic complained of here. He first deducted from the total burden upon the car of livestock the sum of 75c, being the expense of loading at the terminal point, as the loading at interior points is done by the shipper, leaving $21.41 in lieu of the $22.16 in the case of shipments from the river. He then added the interest and depreciation upon the investment in stockyards at interior points, which divided into the total cars actually handled, amounted to $2.25 per car; then added 25c per car additional for cleaning the stock pens, and the expense of setting in the cars, resulting in delaying trains, making a total special burden on livestock shipments from interior points, of $23.91 per car. He then recalled as above stated that the 20c rate on the products of animals, after deducting the burdens, left a rate of 7.19c per hundred for simply hauling the load, plus the weight of the car. To produce a similar rate for hauling livestock from interior points, with the burdens upon the same heretofore mentioned, and taking into account the weight of the contents and of the car, it appears that it would be necessary to collect on cattle not 23½c per hundred, but 27½c per hundred to give the railroad company the same net revenue that it receives for hauling packing house products, and applying the same basis to the shipment of hogs it would be necessary to make the rate 33½c per hun-

dred instead of 23½c; and if the comparison is made with the 20c rate on fresh meat, which, as we have shown, loads much less heavily than packing house products, to produce the same net revenue would require a rate of 23.19c on cattle and 28.43c on hogs; in the case of cattle just a trifle under the 23½c rate, but 2.19c above the average rate for the state of Iowa, as shown by the testimony, which establishes that that rate is only 21c (see witness Koch, p. 603); and in the case of hog shipments over 5c a hundred higher than the 23½c rate or 7.43c higher than the average rate from Iowa to Chicago.

Mr. Crosby, Freight Traffic Manager of the Chicago, Burlingaon & Quincy Railway Company, testified, pages 238 to 239, that the total earnings of his company for the year ended June 30, 1905, from the transportation of cattle and hogs, was about $4,800,000, and from the transportation of packing house products and fresh meats about $1,800,000, and from other perishable freight a little over $1,700,000, making an aggregate of about $3,500,000 as against $4,800,000 from livestock, or in the neighborhood of three-quarters. During the same time there was paid out for loss and damage to cattle and hogs and personal injuries to attendants in charge of livestock, nearly $42,000, as against only $13,600 for loss and damage to all other perishable freight, including packing house products and meats; so that the loss and damage instead of being three-fourths, that being the ratio

of the receipts, was less than one-third. At page 241, Mr. Crosby gives an interesting exhibit of the relative revenue received for the transportation of cattle and hogs and other commodities, and on page 242 shows that the Iowa distance tariff projected to 490 miles, the distance from the Missouri River points to Chicago, would produce a rate of 25.23c on cattle, and 22.12c on hogs. The Kansas rate, if projected, would produce a rate of 31c per hundred on cattle, and 39½ per hundred on hogs. The Missouri Railroad Commission tariff for 400 miles gives a rate of 21c a hundred on cattle, and 24c on hogs, and if the rate was extended to 490 miles on that basis, the cattle would be raised to about 25c a hundred. He further says that aside from the rates from Chicago to New York and other eastern points, he knows of no rate in any part of the United States on cattle and hogs as low as 23½c for a distance of 450 miles. At page 243 he testifies as follows:

> "Q. Is the service rendered by railroads in the transportation of cattle and hogs more or less expensive than the service rendered in transportation of packing house products?
>
> A. I think it is more expensive—livestock is of more of a perishable character than packing house products; we have to provide special facilities for loading it, and we have to provide places for unloading it and feeding it, and taking care of it in transit; we provide facilities for handling livestock that we do not for any other class of freight. * * *
>
> "Q. In proportion to the service performed is the net revenue received by the railroads for the transportation of cattle and hogs greater or less than the net revenue received by them

for the transportation of packing house products and fresh meats?

A. I believe we can handle packing house products under the present condition of affairs for less money than we can livestock. I believe we have less net money when we get through handling our livestock than we do with the products."

On cross-examination Mr. Crosby, at page 265, says that so far as the business of the packing house products and fresh meat is concerned, it can be handled on schedule trains, and the road still do the balance of its business without interference. He then proceeds:

"The livestock comes to us as a class that calls for special service. It either moves in large quantities or comes to us in train loads from the range or it is picked up by local trains. The business that comes to us at the Missouri River generally comes to us with the request and the demand in fact, that we make fast time from the Missouri River to Chicago. It necessitates our making time that is faster than our schedule trains make, and we have to perform special service. In order to give special service either to livestock or anything else, regular business has got to step one side, for the track has to be kept clear to give it the right of way. In addition to this we have to go to the extent of providing facilities not only at the starting point, but at intermediate points, for looking after the livestock. If anything happens we have got to provide a place to feed and water them, and sometimes it is practically impossible to do it. In the case of handling fresh meat or packing house product all we have got to do is to keep it under ice. If it is under ice, the length of time doesn't cause any extra shrinkage nor claims

for damages which is true in the case of livestock, where we have all kinds of claims for shrinkage and loss in value, and that makes the business very much more expensive. The 28-hour law also makes an additional expense. * * * We have to provide yards especially under the 28-hour law, where we can unload the cattle, and sometimes the enforcement of the law requires additional facilities where the yards as at present established would not take care of the business."

At page 287 Mr. Crosby was being cross-examined upon the comparative cost of handling livestock and other commodities, and testified:

"As I remarked before, it seems to me that livestock is the most expensive proposition we have to handle. We have to give it special service, it is perishable and it seems to me it ought to stand more in proportion than the general average of our business.

Q. Including your local freight?

A. Yes, sir.

The Court: Now, what other point do you give to sustain the fact? You furnish passes to men in transporting them?

A. Yes, sir.

Q. What else?

A. We carry less weight per car than we can on almost any other commodity; we have to hurry them through.

Q. There is more danger from wreckage?

A. Yes, more danger from wrecks; we have to run faster, and if we are delayed with them we have got to provide means to feed and water them, and we have got to give them special attention in every respect that we don't have to give to anything else, and transportation for the employes in charge, and we have to build special pens for unloading and taking care of them."

At page 288 Mr. Crosby testifies that livestock takes up a great deal more space in proportion to weight than packing house products or fresh meat, and that as a matter of fact, nearly every manufactured product is more bulky than the raw material from which it is made, except in the case of packing house products. At the request of the court, Mr. Crosby during the adjournment made up a statement of the reasons why it costs more to handle livestock than it does packing house products or other similar freight, and gives these reasons at pages 289 to 296, inclusive. At pages 295 and 296 the court will find Crosby Exhibit A, wherein fourteen reasons are given for the additional cost of handling livestock, and upon further examination upon the same page, there is added to these reasons the additional one that the weight of the car bears a larger proportion to the total weight in the case of livestock than in the case of packing house products.

Mr. Gardner, of the Chicago & Northwestern, at page 320 testifies that the average weight of the cars employed on his road in the transportation of live cattle and hogs is about 18½ tons, including the bedding and offal; the average weight of cars used in the transportation of dressed meats and prepared products about 22 tons, allowing for the ice; that the average weight of the contents of the cars when loaded with livestock or live hogs 9 7/10 tons; the average weight of the contents of the cars when loaded with dressed or prepared products of

cattle or hogs 12 2/10 tons, which shows clearly that the proportion that the car bears to the total weight is much greater in the shipment of livestock than in the transportation of products. On page 321, he says that through trains of live cattle and hogs average from 25 to 28 miles an hour, and a pick up train of cattle and hogs—and the average train of livestock on the Northwestern comes from about ten different places—averages about 35 miles an hour running time, while on the same portion of the road the average rate of speed at which trains of dressed or prepared products of cattle and hogs are moved is only from 20 to 22 miles an hour; that the average tonnage rating of locomotives in the transportation of live cattle or hogs is from ten hundred to eleven hundred tons, 35% of which only is revenue tonnage, and that the average tonnage rating of locomotives used on the same portion of the road in the transportation of dressed or prepared products runs from 1,000 to 1,250 tons, and 36% of that is revenue tonnage.

On page 322 he testifies that livestock trains are given the same preference over all other freight trains, including those loaded with dressed or prepared products of cattle or hogs, that passenger trains are given over all other freight trains, and in some instances they have the preference over passenger trains. At page 330 he notes another reason for the additional expense of handling livestock over that incurred in moving the product, namely, that the product is moved regularly; it is possible to figure on a certain number of cars every

day from the same places, and it is ready every day with the same regularity that a passenger train is ready to depart from its terminal station; it is known several hours in advance of departure how many cars of beef are going to be shipped, so it is possible to collect enough additional freight to fill out a train, if necessary, and the trains are run at a regular rate of speed; but in the case of stock cars it is entirely different. If dressed beef cars are delayed by a wreck or anything of the sort, it is only necessary to see that the refrigeration is kept up and the ice in all cars will ordinarily last ten or twelve hours without additional icing; and the loading of dressed beef is generally confined to the main line of the road or lines on which there is a heavy traffic, so it is not necessary to start a special engine and special crew to bring it down to the main line, and it is much easier to regulate trains on the main lines, and much less expensive. In the case of livestock there is an indefinite movement as compared with the regularity of the movement of dressed beef and packing house products. It is dependent in a great part upon market conditiions at the various purchasing or packing plants. At page 332 he calls attention to the large number of men who have to be kept on duty on Sunday so that trains of livestock can reach the Monday market in Chicago, and whose duty it is to water the stock, repair and inspect cars, and having no other work to do the company pays for full time, while it gets only a half day's service. He then proceeds to give the other unusual expenses in handling live-

stock, which we have heretofore quoted under another head. At page 334 Mr. Gardner says:

> "I know I would guarantee to increase the revenue freight of the Northwestern from 25 per cent to 40 per cent if we could eliminate the livestock from it, and I have no doubt other operating men could do better than that."

And at pages 336 and 337 he sums up the whole matter as follows:

> "Q. From your experience can you tell us how the cost of the transportation of live cattle and live hogs, all conditions considered, compares with the cost of the transportation of the dressed and prepared product of cattle and hogs? Is it greater or less, and about what per cent?
>
> A. I should place the livestock at 100 and the products at about 70. * * * *
>
> The Court: That is the cost, if I understand your question.
>
> Mr. Baxter: That is the cost?
>
> The Court: The comparative cost?
>
> A. Yes, sir."

Mr. Tittemore, of the Minneapolis & St. Louis and Iowa Central, testified, page 575, as follows:

> "Q. In your opinion is the service rendered by railroad companies in the transportation of live cattle and hogs more or less expensive than the service which they render in the transportation of packing house products and fresh meats?
>
> A. I consider that the service rendered is more expensive for livestock than for packing house products and fresh meats. * * *
>
> Q. How is the net revenue received by railroads from the transportation of cattle and hogs as compared with the net revenue received by them for the transportation of packing house products and fresh meats?

A. I believe—it is my best judgment that the net revenue received from the transportation of livestock is less than from almost any other—I might say any other class of freight."

At page 580 the court asked Mr. Tittemore the following question:

"Q. Do you think you get a high enough rate on dressed meat and packing house products?

The Witness: Well, no, your Honor, I do not. I have contended constantly for a higher rate on livestock than now exists, and I do not believe that the present rate of packing house product is reasonable as a compensation to the carrier."

Mr. Rice, General Inspector of Transportation for the C. B. & Q. Railway, says, at page 453, that the average rate of speed at which trains of live cattle and live hogs are moved is from 15 to 20 miles per hour as against five miles per hour for ordinary dead freight trains, making this computation in each case by dividing the number of miles in the journey from Missouri River points or St. Paul to Chicago, by the hours required to make the trip. In order to bring this result of 15 to 20 miles an hour from the point of starting to the point of delivery, it is, however, necessary to make in the actual running 25 to 30 miles an hour, and in the case of dead freight it is necessary to make 10 miles an hour in order to average five miles per hour from the point of starting to the point of delivery. At page 454 he testifies further that increasing the speed of a train from 12 to 18 or 20 miles an hour would decrease the tonnage a loco-

motive can pull from 40 to 50%. At page 455 he states that preference is invariably given to trains of livestock over trains of packing house products or any other kind, frequently including passenger trains. At page 455 he says that he has known of thousands of cases where stock trains were started at Galesburg, Illinois, for Chicago, ahead of passenger trains, and preceded such passenger trains to Chicago, and at page 456 that on certain days in the week when the livestock movement is heaviest, it frequently requires all the power the road possesses to move it, and other freight must lie by and be delayed, and it frequently takes two or three days to catch up and move other freight that has been stopped. After testifying to the cost of the stockyards along the lines of the Burlington road east of the Missouri River, and the cost of maintaining the same, the witness testified that cattle frequently get down in the cars, and it is necessary to stop the trains to get them up; that delays from ten minutes to an hour result, and at times it is necessary to side track the train and take the cars to local stockyards, unload them and re-load them. (Page 458.) He also testifies to the fact that when reaching Chicago it is necessary to hurry the deliveries of stock from the point of intersection of the Burlington tracks with the Union Stockyards tracks down to the yards, irrespective of whether there is a complete train load to be taken in or not; that this is necessary to insure reaching the market within the proper delivery time; that nothing of this kind is required in the

case of packing house products or ordinary dead freight. (Page 458.)

At pages 459 to 463 Mr. Rice testifies at length with reference to the additional expense incurred in making up and handling trains of livestock over the cost of handling packing house products emphasizing the fact that all the packing house products move from comparatively few points over the main line in regular trains, while live stock has to be picked up at largely increased expense on the branch lines, brought to the main lines, and assembled into trains; that the main line trains have to come to such junction points only partially loaded, so as to be able to take the livestock when delivered at such junctions. He states that 70% of the stock coming into Chicago is hauled for a distance on branch lines to the point of delivery to the main line. He mentions a number of incidental expenses, which in the aggregate are very important items of cost in the movement of livestock trains. At page 464 he testifies:

> "Q. In your experience how does the cost of transportation of live cattle and hogs, all conditions considered, compare with the transportation of the dressed product of cattle and hogs?
>
> A. The cost of the transportation of livestock is considerably greater than the cost of the transportation of the product. * * *
>
> Q. What is the difference between the cost of handling the dressed or prepared product of cattle and hogs in through train loads from St. Paul and Missouri River points directly through to Chicago, and the cost of picking up live cattle and hogs at way stations?

A. The cost of picking up live cattle and hogs is much greater. The packing house freight is confined entirely to the main lines, and it has no connection with the branch lines; it is not handled on those interior lines as the stock is."

At page 466 he testifies that it costs 30c a car to clean stock cars, and owing to the fact that the cleaning tracks are necessarily, on account of their being a public nuisance, in remote places, a long switch is required to move the cars to and from that track, the cost of which he estimates at 30c per car, making in the aggregate 60c a car for the switching and cleaning.

He further testifies at pages 466 and 467, that he agrees with Mr. Gardner's statement that but for the necessity of cleaning the stock cars the road would be able to do with 20% less cars, and handle the business except that he thinks it takes two days, oftener than one, to clean the cars; and the total number of stock cars on the C. B. & Q. being over 6,000, 20% of the same would be 1,200, costing in round figures over $700,000. He further says that about half the cars are required to be disinfected at a cost of about 20c a car. At page 469 he says an additional expense in handling livestock is caused by the fact that prospective shippers order cars set out on branch lines, and then reconsider and fail to ship, which causes a dead loss, as it is necessary to run through with half a train or less.

Mr. Daly, of the Illinois Central, testified to a number of comparisons of expenses in handling the two classes of traffic under consideration; that locomotives hauling livestock trains haul about an average of 780 gross tons per train. This, of course, includes the weight of the cars as well as the contents, and the average tons hauled by locomotives in the transportation of dressed or prepared product of cattle and hogs is about 867 tons; that the increase in speed from 12 miles to 18 or 20 miles per hour reduces the average tonnage that can be hauled by a locomotive about 39%. (Page 801.) He further testifies that livestock trains have the preference at all times over trains carrying dressed meats or packing house products, which delays the other trains. He further shows that extra engines have to be kept ready for service in handling the trains of stock which are bunched certain days in the week, and that other freight has to wait, causing congestion in the yards at interior junction points. (Pages 802 and 803.) 86% of the cars intended for the transportation of livestock move to the point of shipment empty, while only 48% of the refrigerator cars loaded with packing house products move west empty. The Illinois Central owns its own refrigerator cars, and loads a large percentage of them going west with fruits brought up from the south. (803, 804.) In the five winter months there is 128% more livestock moved than during the five summer months, or an average of 69 cars per day in winter against 30 cars per day in summer, while there is only 5% differ-

ence between summer and winter in the movement of packing house products. (Pages 804, 805.) The average life of a stock car is only about twelve years, as compared with 20 years, the average life of an ordinary box car. (Page 808.) He also testifies:

> "Q. Are any trains of cattle and hogs run special in order to make the markets, or are they always run upon some fixed schedule?
>
> A. We have a schedule, but on these days when the heavy movements occur, they are run ahead of that schedule and run special ahead of the schedule in order to get the first train in two or three hours ahead of the schedule time, for the reason that the last train will be that much behind the first one and get it in on its schedule. If a stock train is delayed for any reason our superintendents and chief dispatchers have written authority to run the trains up to a maximum speed of 35 miles per hour in order to make the market." (Pages 808 and 809.)

Then in answer to a general question as to whether there are any other special expenses incident to the transportation of live cattle and hogs that are not incident to the transportation of their products or even of ordinary dead freight, Mr. Daly first testified as to the cost of cleaning cars. We have called attention to this in another connection. On page 810 he again speaks of the fact that the stock cars moving back west empty to the per cent they do, creates about half as much more train mile expense as the packing house products create; that in addition to building and maintaining the stockyards it is necessary to send men to test and

adjust the scales, look after the water supply, troughs, flooring and fencing, and there is also over time paid to station agents, who are obliged to be present to seal cars at night time. At pages 811 and 812 he states that the heavy movement of stock on Monday has a tendency to reduce the average number of cars of stock hauled on the other five days of the week, and frequently they are compelled to run stock trains on a fast schedule with only ten cars of stock, filling the trains up to the maximum of the fast rating, namely, 780 tons, with dead freight, which results in hauling a low grade commodity at a very expensive speed which that commodity does not pay for, because it is necessary to handle the ten cars of stock the same as though it were a full train. He gives an example as follows:

> "Take ten cars of stock; that is, 280 tons on the 780 rating. That gives you 500 gross tons of other freight to put in. That would be about 12 or 13 cars. Now, if it were not for these ten cars of stock, instead of hauling 780 tons we would be hauling 1,200 tons of the dead freight, or else not running the train. Consequently, the stock handled in less than solid trains of stock is more expensive than when handling in solid trains."

It will be recalled that the lower tonnage rating of the locomotive is caused by the faster speed at which stock trains are run, so that while a locomotive may haul 1,200 tons of ordinary freight at the speed slow freight trains are moved, the same locomotive will only haul 780 tons at the rate of speed required in the transportation of livestock. After

speaking of other expenses chargeable to the two classes of freight, Mr. Daly sums the matter up on page 816 as follows:

> "I think the packing house products give us 30% more revenue than the livestock, taking into consideration the switching charges that we pay to the packers at the Missouri River, Sioux City and Omaha; taking $10 cost on the refrigerator for mileage; take the $3 cost from here to the junction railway getting rid of the packing house stuff, etc.; take the $1.16 claims for damages, average per car for damage to the packing house product, and deducting that from the amount received per car at the 20c rate; then take the livestock, the cost of your yards and the cost of your facilities for taking care of it, the cost of returning the men, both in coaches and sleeping cars, the claims and the fixed charges connected with it, and you have got more revenue to apply on the transporting of the product of packing houses than you have on the livestock, considerably more. I should say 30% more.
>
> Q. You mean the rate on livestock ought to be about 30 cents instead of 23½c?
>
> A. I am figuring that way, yes, sir."

Mr. McCullough, Vice President of the Chicago Northwestern, in charge of the traffic, after giving a lot of details, testified at page 951, in answer to a question by the court:

> "My general observation and the information that has come to me from time to time, I think our present rates on dressed beef and packing house products, our present rates on livestock from Missouri River points and all the territory that is tributary to the Missouri River, are lower than they should be. As to what differences should be made in those rates so as to make them fair and reasonable to the

railroad and to the shippers, in cents per hundred pounds, I am unable to say. As to the relative difference in the rate between dressed beef and packing house products and livestock, I am thoroughly satisfied in my mind that there should be a difference, that the rate on livestock should be higher than the rate on dressed beef and packing house products. What that difference should be in dollars and cents, I could not state today."

The testimony of Mr. A. C. Bird, Vice President of the Missouri Pacific, formerly Third Vice President of the Chicago, Milwaukee & St. Paul Railway Company, given by him upon the trial of the case before the Commission, was read in evidence as Mr. Bird was ill in California and unable to appear and testify. At page 1961 the question was asked Mr. Bird:

"Q. Now, based on your actual experience for the last ten or a dozen years, has the loss either in transporting livestock or dressed beef, or the difference between them in that respect, been sufficient to justify a difference in the rate, I mean so far as the question of actual loss to the carriers is concerned.

A. That is necessarily largely a matter of opinion. As a matter of fact however, there is scarcely any comparison of the losses on the one and on the other. Nothing short of collision or the wrecking of a train of meat or an unusual delay has in my recollection resulted in any claim, certainly not in the payment of any claim on refrigerator property, while a much shorter detention of livestock results in heavy claims.

Mr. Tomlinson: Do you mean to say that your company pays claims for delay of livestock in transit if they fail to reach a market?

A. If they fail to exercise due diligence. If

the delay was caused by accident, wreck, etc., and holds back a livestock train, yes, we pay those damages.

Mr. Tomlinson: How about fresh meat?

A. No, unless the meat is injured, and it would not be any ordinary delay."

Again, on the same page, Mr. Bird testified that it was more risky to carry livestock than the product, because the livestock was alive and subject to accidents, which did not attach to the transportation of property under refrigeration. At page 1966, Mr. Bird testified that more service is performed in gathering up business along the line than in handling the train loads through from the river or the portion of the train load made up of packing house products; the service on livestock is a great deal more expensive than on fresh meat for the reasons stated.

Again, on page 1968, Mr. Bird testified:

"There is no occasion for the speed on the packing house commodities from the Missouri River to Chicago that there is on stock trains that pick up cars all along the line of road and have to run to make a certain market. There is no necessity for the speed on fresh meat that there is on livestock, because the fresh meat is refrigerated and the livestock is not."

At page 1971, he says:

"My belief is that the rates on livestock from Missouri River points to Chicago do not pay a just proportion of the total transportation charge between those cities. * * * It costs more to haul livestock than a car load of first-class freight."

Mr. Bird, on pages 1998 and 1999, made sundry comparisons showing the percentage that the freight charges bear to the value of livestock and other commodities on the basis of a haul of 200 miles, which would run over into Iowa for some distance. This showed that the freight charge on the cattle was only 2.6% of the value of the cattle, while on coal it was 92% of the value of the coal; staves and heading 15% of the value; brick 85% of the value; lumber 23% of the value; salt 51% of the value. He then made a computation showing the relation between the amounts exacted by the members of the Chicago Livestock Exchange, the petitioners, for handling the stock after it arrived at Chicago, and the amounts received by the railroads for transportation, which showed that it was necessary that the stock should originate some place considerably in excess of 50 miles from Chicago, before the railroad charge equaled the amount exacted by the commission men. His testimony is as follows:

> "I had occasion at the same time to compare the railroad's earning capacity on livestock with the total charge exacted, or to which that stock was subjected to after the transportation act was complete, and I found on a 50-mile haul and the rate on this basis was not much in excess, if any, of the average through rates charged from Chicago on Iowa stock. The freight was $14.63 and the yardage $5; commission $10; hay $1.25, making a total of $16.25, which was 111% of what the railroad got out of it on a 50-mile haul; and on sheep in single deck cars they got 139% of the freight rate; on hogs in double deck cars they

got 114.10%. For 100 miles, it was on cattle $16.25 terminal charge against $18.05, and on hogs in single decks the railroad charge was $19.50, and the charge here was $12.05, and so on down."

George E. Simpson, Superintendent of Transportation of the Chicago, Milwaukee & St. Paul Railway Company, testified, page 672, that preference was given to livestock trains over trains loaded with the products of cattle and hogs, in order to reach the market at a given time. He said:

"We are obliged to get the stock in for the morning market.

Q. Well, why? Why are you anxious to do that?

A. They ship with that view. They load with a view of arriving at Chicago at a given time in the morning. We consider stock arriving at the yards after eight o'clock as late stock, and the market is liable to decline and result in loss to the shippers.

Q. Well, what does he do if he sustains a loss by reason of not getting there in time?

A. He generally makes a claim.

Q. You give preference to these livestock trains over any trains other than freight trains, do you?

A. Yes; we commonly give them preference over our ordinary passenger trains, both in running ahead and at meeting points."

Again, at page 674, he testified that owing to the irregular movement of livestock there are six or eight months in the year when 10% or 15% of the livestock cars are idle, and while the livestock tonnage of the road is only 4.53% of the total tonnage, and during the year 1904 over $66,000 was paid

out for claims on stock shipments. He further testified that in the territory in question 216 stockyards were maintained, of a total value of about $184,000, and he estimated the cost of maintenance and renewal of the same at about $23,000 per annum. On page 678 he gives about the same testimony as to special expenses incident to the transportation of live cattle and hogs which are not incident to the transportation of dressed or prepared products of cattle or hogs, that was given by the other witnesses. On page 677 he testified:

> "Q. In your experience how does the cost of transportation of live cattle and live hogs, all questions considered, compare with the cost of transportation of the dressed or prepared product of cattle or hogs?
> A. The first is greatest."

On page 678 he states that the road has about 200 cabooses equipped with bunks, blankets, mattresses and pillows for the accommodation of stock men. Free transportation is furnished shippers of stock, but not the shippers of the products.

Against this great mass of testimony, besides other cumulative evidence, the complainant offered as witnesses Mr. E. P. Ripley, President of the Santa Fe; Mr. James Peabody, Statistician of the same road, and certain computations made by Mr. Tomlinson, who was the attorney for the Chicago Livestock Exchange upon the hearing before the Commission, and also a few statements made by other witnesses before the Commission. Mr. Ripley and Mr. Peabody made a series of statements

based upon the average cost of transportation per gross ton miles, without attempting to make any distinction between different classes of commodities, and then added the terminal expenses in all cases, and in the case of dressed meats and packing house products added the car mileage and certain expenses peculiar to the Santa Fe, but which were not borne by other lines, and which, therefore, should not be considered, and also omitted to charge the cattle traffic with the expenses of equipment as computed by Mr. Stickney, which exceeds the car mileage, with the result of showing that it was more profitable to transport cattle than dressed meats, and also slightly more profitable than to transport packing house products at the same rate. See statements, pages 1104 to 1106. On cross-examination, however, Mr. Ripley conceded practically all of the items of additional expenses testified to by the other witnesses which he had not taken into account in making his exhibits, and also admitted that the tables were not based upon actual conditions, as the proportional rate actually paid on livestock from Kansas City to Chicago was considerably less than the 20c collected for packing house products. At page 1120 Mr. Ripley testified:

> "Q. Is it a fact, Mr. Ripley, that all or substantially all the livestock that is carried to Chicago from Kansas City is carried on a proportional?
>
> A. I think most of it is, yes, sir.
>
> Q. And that proportional is considerably less than 20c, is it not?
>
> A. I think so.

Q. Consequently, a comparison such as you have introduced here as between rates at 20c for packing house products and dressed meats on the one hand, and live cattle on the other, would not be a comparison which would be applicable to existing conditions?

A. The rate would have to be—in order to make the comparison authentic or valuable—the actual rate in force would have to be used."

In view of all the testimony it is apparent that the court below was abundantly justified in his second finding of facts, to-wit, that the cost of carrying livestock is greater than that of carrying dressed meats and packing house products.

The references that have been made to the testimony of the various witnesses show clearly that the defendant railroad companies pay out a much larger amount in damages for losses arising from the carriage of livestock than they do for losses from the carriage of dressed meats, and packing house products, in proportion to the value of the products carried, and more in damages per car, regardless of the value, even conceding, as is found by the court in its third finding of fact, that dressed meats and packing house products are in value worth nearly twice as much as livestock. Therefore we are content to assert that, conceding everything with reference to the value of the service found by the court in his third finding of fact, the said value is not an important element in this particular case in fixing rates, by reason of the facts stated in the finding itself.

THE FOURTH AND FITH FINDINGS OF FACT OF THE TRIAL COURT ARE TO THE EFFECT THAT THE RATES GIVEN PACKERS FROM MISSOURI RIVER AND ST. PAUL, ARE THE RESULT OF GENUINE COMPETITION.

It appears without controversy that the present rates on packing house products were first permanently established in August, 1902, by a contract made between the Chicago Great Western Railway Company and the various packers doing business at Missouri River points and St. Paul by which it was agreed by the railway company that it would put in and publish the rates in question, and maintain them for a period of seven years, in consideration of which the packers agreed to give to the Chicago Great Western Railway Company a certain percentage of their business. This contract was caused by competitive conditions. The lines of railway owned and operated by the various defendants are all competitors for this business or a portion of the same. They are all competing for the Missouri River business, and most of them for the business from St. Paul, and have been for a number of years. From Kansas City and St. Joseph the Chicago Great Western is the long line. At page 638 Mr. Stickney was asked how he arrived at the rate his road was to receive on dressed beef, and was asked whether he did not get that on the basis of the cost with a profit, and responded as follows:

> "A. No, the rates were not made that way, the dressed meats were not. We had been in business for eight or ten years, I guess,—

longer than that,—hauling dressed meats, and the way the rates were made a packer would come around and say: 'Well, now, Mr. Great Western Road, if you want to haul any of that dressed meat, you have got to,' they say they are very fond of you and they will give it to you in preference to anybody else at the same price, but you have got to make the same price. 'Well, what is the price? The tariff rate is 23 cents, isn't it? What price have we got to make to haul it?' 'Well, we do not want to make a price on your stuff. What price will you haul it for?' 'Well, the tariff rate is 23 cents.' 'Would 20 cents do?' 'No, no; oh no, not 20 cents.' 'Well, will 18 cents do?' 'Oh no, no.' 'Well, what rate will do?' 'Well, we can get it hauled for 16 cents. If you want any of it at that price you have have it.' Well, we generally take it. That is the way the rates were made, by bargaining. It was all billed at 23 cents, and then if the rate agreed upon was 16 cents, why, it was rebated.

It went along that way for a great many years, and finally after one of these—I have forgotten whether it was the Elkins' law or what law was passed, the railroads had sort of a spasm, and they wanted to put up the rate. I think it was one of the decisions of the Interstate Commerce Commission in the Alton case that the rate on packing house products per hundred pounds must be higher than the livestock rate, so they wanted to put up the rate and they were afraid to make rebates, and so forth, and the packers came around and made the proposition that they would give us 20 cents per hundred to Chicago, and 18½c per hundred forthrough business, and give us a certain percentage of their output every month—not every year, but every month—so that we had a steady quantity all the time, provided we would put in a tariff of that kind and keep it in force for seven years, and that is the way the tariff was made. We knew the rates were more than we ever got before."

In a circular letter to the stockholders of the Chicago Great Western Company, dated August 4, 1902, issued by the President of that company at the time the contract with the packers was made, and which letter was introduced in evidence by the complainant, and will be found at pages 1911 to 1916 of the record, there appears a very complete statement of the competition that had existed for years for the traffic in packing house products and fresh meats. As stated before, this was introduced in evidence, not by the defendants, but by the complainant, and it shows in a much more elaborate way than was developed in Mr. Stickney's testimony on the stand the organization of the packers and the methods in which this business had been competed for. These large corporations each had skilled traffic men who were able to control the traffic of the corporation that they represented; the amount of such traffic was enormous, and for reasons that have heretofore appeared, highly desirable to the railroad companies; for even if transported at low rates, so long as there was any profit over and above the actual cost of transportation, it swelled the volume of traffic over which the general expenses of the road could be spread. For years prior to the spring of 1902, when injunctions were issued out of the Circuit Court of the United States against various of the roads competing for this business, enjoining the payment of any further rebates, the published rate had not been observed, but by the stress of competition the rates had been cut by means of rebates, to as low as 16 cents per hun-

dred pounds. No railroad knew what another was getting for the service, and all were competing for the business. Although the full published rate was collected for a month, it was understood by the railroads that the pressure that could be exercised by the tender of the enormous traffic would necessarily result in successive rate cuttings by the different lines in consideration of traffic, so that eventually the rate might be reduced to such a point that the business would have to be transacted at a loss, or certain of the roads retire from the competition. With this state of things existing, the contract with the Chicago Great Western Railway Company, by which the packers agreed to pay 20 cents per hundred pounds on traffic terminating in Chicago, and 18½ cents per hundred pounds on traffic destined to the east, for a period of seven years, and to give to that road a certain percentage of the business, irrespective of what rates might be made by other lines, in consideration of which the railway company agreed to publish and maintain such rate for that period, was entered into. As found by the trial court, it appears clearly by the testimony that this contract did not originate the competition, but it was in the effort to save a portion of this business at a living rate, and prevent competing lines from taking it all away by cutting rates, that this contract was made. As soon as it was known that this arrangement had been entered into, it is apparent that the other lines were compelled to cut the rate or the packers would have turned over to the Chicago Great Western the en-

tire traffic or such portion thereof as the facilities of that railway would permit it to carry. Therefore, the testimony of the various witnesses that this rate was made by competition, is, both as to the Chicago Great Western and the other lines, absolutely true; and what doubt can there be on the uncontradicted testimony of Mr. Stickney alone, that the trial court was entirely justified not only in finding that the rate was induced by competition, but that the competition was genuine and in no way fictitious, and that it did not result from any agreement between the defendants. And not only was this rate fixed by competition, but the rate upon livestock was also fixed in the same way, although the competition was necessarily less severe, as the packing house traffic was concentrated in the hands of parties who could throw an enormous volume to whichever line they chose. Mr. Crosby testified, page 239, that the rates on cattle and hogs are affected by competition and regulated by competition, as between carriers and as between markets. Again, pages 250 and 251, Mr. Crosby said, in answer to a question as to whether the railways other than the Chicago Great Western, can for any reason increase the rates on packing house products and fresh meats from the Missouri River to Chicago:

> "A. No, sir, not if they want to engage in the business.
>
> The Court: Why?
>
> A. Because there is a contract with these roads in effect, 20 cents from the Missouri River to Chicago.

Q. A contract on the part of the Western Company alone?

A. Yes, sir.

Q. Why cannot the other companies go ahead?

A. Well, we cannot handle business between the Missouri River and Chicago at a higher rate than our competitors do.

Q. Because when one company acts you must all act?

A. The action of one will regulate that of all.

Q. That is, providing you get any business?

A. Yes, of course, we can go out of business."

At page 399, Mr. Keepers, of the Illinois Central, after stating that he considered the rates on cattle and hogs unreasonably low, was asked:

"Q. Are they in any way affected by competion?

A. Entirely so, otherwise they would be much higher."

At page 417 he testified as follows:

"Q. Can a railroad other than the Chicago Great Western fix rates on packing house products and fresh meats from St. Paul and Missouri River points, and other points, without abandoning the traffic?

A. They would probably have to abandon the traffic. If the volume was so great that the Great Western could not haul it, they might give us some business, but probably it would not amount to much. I think the Great Western would increase its facilities so as to do it all. It would mean abandoning the business.

Q. I understand that the relation between the rates on livestock and the rates on packing house products has been changed, not by increasing the rates on livestock, but by re-

ducing the rates on packing house products. Is that correct?

A. That is correct."

Mr. Hiland, of the Chicago, Milwaukee & St. Paul, at page 506, after stating the existing rates on cattle and hogs are too low, says that they are induced by competition between roads and various markets. At pages 510 and 511, in answer to questions by the court, testified:

"The rates on dressed meats and finished products between the Missouri River and Chicago have been reduced from the points that I have suggested, so that they gradually got down below or in the neighborhood of the cattle rates. They were reduced still lower by competition prior to the Great Western contract. That has been done by competition, but the Great Western contract carried it to a point where it was a minimum. It got to a point where there was no opportunity to go under or below that without carrying it—I won't say at a loss, but the roads determined that they would not make any less rate than that. Instead of adopting their usual practice of one road cutting a rate and the other cutting it lower, they finally got down to what we might term rock bottom. They said, 'This rate has got now to a point where nobody wants to go any lower.'

Q. This twenty-cent rate on the product was fixed entirely by competition among the carriers, competition among the railroads that carry that product, that is what fixed that and there was not any market consideration about it?

A. Competition fixed the rates as they exist at the present time on both the finished product and the live animal."

Again, on page 511, when asked as to the circumstances which led up to the making of the Great Western contract, he answered:

"A. In answering that question I do not know of my own knowledge but only by hearsay as to what led to the contract and the making of it by the Great Western road. In my opinion the Great Western road in making that contract were governed by hearsay in the making of that rate, the same as we have all been governed in the making of the rates when we want business. We ascertain, as near as possible, what the other fellow was getting, and then we meet that rate or as near that rate as would enable us to carry what we want."

Mr. Tittemore (page 586) testified:

"Q. Is it not a fact that from the situation that exists you must accept the traffic at the rates which the other roads are pleased to publish to Chicago?

(It will be remembered that Mr. Tittemore's roads are the Minneapolis & St. Louis and the Iowa Central, which reach Chicago only through connections.)

A. Competition fixes the rates; we must accept or build into Chicago. * * *

Q. And if you built into Chicago it would be the same situation, you still would have to accept the rates that others were making?

A. Yes, sir."

Mr. Gower testified, page 720:

"Q. Are those rates affected or not affected by competition, I mean the rates between the Missouri River and Chicago?

A. Oh, they were put there originally by competition.

Q. Sir?

A. It was competition that put the rates there."

At page 761:

"Q. Were these rates from the Missouri River on the product of livestock made lower as a matter of judgment, or not?

A. The rates from the Missouri River were made to meet the competition of another road that established the rate."

Mr. McCullough, vice president of the Chicago & Northwestern, testified, page 939:

"Q. Should your road attempt to charge higher rates on packing house products and fresh meats from South Omaha to Chicago and points east than are charged by the Chicago Great Western Railway, under its contract with the packers, what would be the effect upon your traffic in packing house products and fresh meats?

A. We would abandon it to the other roads, whose rates are less than ours.

The Court: Do you get your share of the traffic now?

A. Yes, sir, the rates being the same. * * *

Q. Now, Mr. McCullough, if you should attempt to raise your packing house rates, so as to make them as high as your livestock rates. I understand you would have to go out of the business, as long as the contract between the Great Western and the packers continued?

A. Unless all the other railroads did the same thing.

The Court: Including the Great Western?

A. Yes, sir. * * *

Q. And the only effect of it would be to drive you and the other lines that operate between the Missouri river and Chicago out of the packing house business?

A. We would retire from the business, and turn it over to the Great Western road."

At page 953, Mr. McCullough testified:

"In making the rates on the 8,000 miles of railroad with which I am connected, there are three features, three conditions that fix about every rate we have in force on our road.

First, is competition. One time our company thought that when a rate was made by a competing road that was less than our company thought we could do the business at, we thought for awhile that it was not necessary for us to meet those reduced rates. Take a country station, for instance, where there is a local station on our road, and a local station on a competitive road, the stations being six or eight miles distant.

We found that the farmer would, of course, drive his livestock and sell it at the station where he would get the most money for it. If the rate from our station was higher than the rates from the competing station on the other road, he gets a better price, of course, on the other rate, and the livestock, instead of being driven to our station was driven to the station on the other road. We found that where the farmer sold his cattle he sold his grain, provided he could get as much money for his grain at the station where he sold his cattle as he could at other markets. We found that where he sold his cattle and grain he also sold anything else, the product of his farm. We also found that where he sold his cattle and his grain and his farm products, he bought his lumber, and he bought his coal, and he bought his dry goods and his groceries, provided they were sold as cheap at that station as they were at the station on the other road.

Since that time it has been the policy of our company to adopt at our stations rates on freight of all kinds, particularly livestock or freight that can be moved readily from one part of the country to another, the rates adopted by our competitors, without regard

> to whether the rates were what we considered remunerative or whether they were otherwise. That, I think, illustrats how the tariffs, 80 per cent. of the rates now in force on the 8.000 miles of road I am connected with, are adjusted."

Mr. McCullough then went on to give the other elements entering into rate-making as a practical question, and said that these elements could be treated under the head of commercial conditions.

At pages 955 and 956, he further elucidated the manner in which rates are made, and included the cost of service as one of the elements.

Mr. Ripley, of the Santa Fe, testified, at page 1101:

> "Primarily, one principal rule which should govern in the making of all rates is what the business will bear. I don't mean by that all that the business can bear, or all that can be extorted from the business, but what the business will bear, having regard to the value of the service to the shipper, which includes the value of the commodity transported; second, the cost to the railroad company, and, third, the relation of the goods, which are the most valuable to those which are the least valuable.
>
> It becomes necessary to bring all of those considerations to bear upon the judgment that is exercised in the making of rates where the carrier has complete control of the rates; but that rule or that method, which is the proper way, is, of course, entirely set aside at times by reason of necessity. It is entirely set aside when competition enters into the case, where it is not a question of what ought to be, but what you can get."

He followed this statement with the testimony heretofore quoted, to the effect that cattle rates have always been too low, and then proceeded:

> "Q. When you speak of rates on other commodities, do you mean packing house product and dressed meat?
>
> A. The packing house products and dressed meat has been a later development, and the rates on those articles have been made not upon any theory of rate-making, and not by the railroad companies, but by the shippers. That is to say, the influence of competition has been such, and the concentration of the business in few hands has been such, that they have been able to dictate terms to the railroads."

While it clearly appears by this testimony that the rates upon packing house products were made by competition of the most strenuous character, and that the rates upon livestock have also been made by competition, still, there is no evidence in the record that the rate upon the one commodity is affected by that upon the other. As we have shown heretofore, all the livestock moving from the points along the Missouri river, and from South St. Paul, is carried on a proportional rate, which is less than the established rate on the product.

The sixth finding of fact by the trial court is:

> "THAT THE PRESENT RATES ON LIVESTOCK HAVE NOT MATERIALLY AFFECTED ANY OF THE MARKETS, PRICES OR SHIPMENTS; THAT THEY ARE REASONABLY FAIR TO CHICAGO AND TO THE SHIPPERS; THAT THE SHIPMENTS OF LIVESTOCK FROM POINTS BETWEEN CHICAGO AND THE MISSOURI RIVER AND ST. PAUL ARE AS GREAT IN PROPORTION TO THE VOLUME OF BUSINESS AS BEFORE THE PRESENT RATES WERE MADE; THAT THE MAJORITY OF THE LIVESTOCK COMES TO CHICAGO FROM POINTS AS NEAR AS 150 MILES THIS SIDE OF THE MISSOURI RIVER AND ST. PAUL, AND THAT THE LOWER RATE GIVEN TO PACKERS DOES NOT SEEM TO DIRECTLY INFLUENCE OR INJURE THE SHIPPERS OF LIVESTOCK."

The court is clearly justified in each of the statements contained in this finding. The adjustment of the rates in controversy became effective in August, 1902. For several years prior to that date, the published rates on the product from the Missouri river to Chicago had been 23½c a hundred, the same as on livestock from the Missouri river zone, so called, which, as before stated, extends about 150 miles east of the Missouri river. The court will take judicial notice of the statistics contained in the United States Census Reports. An inspection of pages 143 214 and 220, of volume 5 of the 12th United States Census Agricultural Report part 1, discloses the following significant facts:

Illinois, in the year 1890, produced 3,063,000 cat-

tle, exclusive of calves, and in 1900 only 2,308,100, a decrease of over 22%.

In Iowa, in 1890, there were produced 4,895,000, and in 1900, 4,077,000.

In Minnesota there is a small decrease of about 5%.

In Wisconsin, an increase of 2.6%.

In Missouri a decrease of nearly 20%.

In North Dakota, an increase of 78%.

In South Dakota, an increase of nearly 68%.

In Nebraska, an increase of 13%.

In Kansas, an increase of 12%.

Colorado remained about stationery.

Indiana, which is partially tributary to Chicago, decreased nearly 17%.

These figures show that during the ten years from 1890 to 1900, and there was no evidence that the ratio of increase and decrease had changed after 1900, the country naturally tributary to Chicago fell off in production of cattle, while the country beyond the Missouri and northwest of St. Paul had largely increased in its production. The showing as to hogs is even more significant. Illinois decreased two-tenths of one per cent. in the ten years named, falling from 5,924,000 to 5,915,000. At the same time Wisconsin increased nearly 50%; Minnesota increased nearly 69%; Iowa increased 17%; Missouri decreased about 9%; North Dakota increased 108%, although its production was still very small; South Dakota increased 39%; Nebraska increased 8%; Kansas decreased about 10%. In the Indian Territory there

was an increase from 1,572 head, in 1890, to 650,000 in 1900; in Oklahoma, from 22,000, in 1890, to about 584,000 in 1900. It is a matter of common knowledge that Oklahoma has developed faster than any other agricultural region in the United States since 1900. Hence the production there has undoubtedly very largely increased over what it was in that year. It will be seen from these figures that the increases have been in territory naturally tributary to the Missouri river and St. Paul markets, and the decreases in the territory tributary to Chicago. Therefore, we would naturally look for a substantial decrease in the receipts of livestock at Chicago, irrespective of railroad rates, and if, as is alleged in this case, there is an undue discrimination against Chicago, which has an effect on the movement of traffic, we would expect to see a tremendous falling off in the shipments to the Chicago market. An exhibit attached to the testimony af Mr. W. J. C. Kenyon, general manager of the Omaha Stockyards & Ry. Co., appearing at page 1022 of the record, gives the total receipts of cattle and hogs at the Chicago stockyards for the years 1901, 1902, 1903, 1904, and the first seven months of 1905, carrying the records down as near as possible to the date af the trial of this case in the court below. It will be observed that 1901 was the year before the rates complained of were put in force, and the old rates continued during a little over half of 1902. It appears that in 1901 there were received at the stockyards at Chicago, 3,213,220 head of cattle; in 1902, 3,193,-

306, being substantially no change, but in 1903, the first full year that the alleged discriminating rates were in force, the receipts were 3,704,299; in 1904, 3,520,684, and in the seven months of 1905, 2,060,445; so that although the production of cattle and calves was decreasing in the territory near Chicago, still the stockyards at Chicago, with the alleged disadvantage of the present adjustment of rates, show an increase in receipts. Kansas City, on the other hand, which must have been the chief beneficiary of the enormous growth in Oklahoma and other points in the southwest, remained substantially stationary; in fact, showed a slight decrease, the figures being 2,279,166 in 1902, the year the present rates went into effect, and 2,137,112 the following year, and 2,163,471 in 1904. Omaha remained about stationary from 1902 to 1903, increasing only 60,000 head, and in 1904 decreased about 130,000. St. Joseph showed a slight increase, but from 1901 to 1904 the increase was only about 12%, although new packing houses had been built at St. Joseph during the time. At Sioux City there was an actual decrease of about 15% from 1902 to 1904; St. Louis, an actual decrease; in St. Paul the increase was only about 25%. In the shipment of hogs there was a decrease at Chicago between 1901 and 1902, and a slight decrease from that year to 1903 and 1904, but the difference between 1902 and 1904 amounted to only about 8%. In Kansas City there was a decrease between 1902 and 1904 of a somewhat smaller per cent. At

St. Joseph, a decrease of about 2%. At Sioux City, an increase of about 11%; at St. Louis, a substantial increase, and in St. Paul, an increase about 25%; but the receipts of hogs at Chicago for the year 1904 amounted to 7,238,746 head, as against only 8,178,458 at the combined markets af Kansas City, Omaha, St. Joseph, Sioux City and St. Paul. These are the markets that are claimed to be the beneficiaries of an undue discrimination against Chicago, and although the livestock is largely raised near to these markets, and vast quantities in the territory far beyond the Missouri river and St. Paul, still there are carried through these places, and from territory naturally tributary to them, almost as many head of hogs, which find their market in Chicago, as are marketed at these places combined. In the case of cattle, the total receipts at Kansas City, Omaha, St. Joseph, Sioux City and St. Paul, in 1904, were 4,414,850 head, and at Chicago alone, 3,520,684. With such a showing as this, it certainly requires a good deal of courage to say that Chicago is suffering from an *undue discrimination* against it.

At pages 999 to 1003, Mr. Kenyon explained this table, and the other exhibits used in connection with it, and his testimony demonstrated clearly that the bulk of the receipts at Chicago come from territory that by reason of its distance is naturally tributary to the Missouri river or St. Paul markets, and that instead of losing business, either by reason of the freight rate situation, or by reason of the decrease in production in the territory near

to Chicago, and the increase in production in the territory near the other markets, it appears that Chicago is continually increasing its business at the expense of the other markets.

Another thing mentioned by Mr. Kenyon, and other witnesses, is that in 1904 there was a strike at the stockyards in Chicago, lasting from the 12th of July to the 12th of September (see Kenyon, p. 1009), but in spite af that fact, it is shown by the table that the receipts of cattle were larger by 300,000 in 1904 than 1901, before these alleged discriminating rates went into effect.

Mr. Baker, the secretary of the Livestock Exchange of Chicago, testified on cross-examination, at page 1447, that the facilities for slaughtering at the Missouri river points were as good as at Chicago, and that at St. Joseph they were superior to the average of Chicago, on account of more modern construction and machinery. Further, Mr. Baker testified, at page 1450, that the by-products of livestock are practically of the same value in Chicago and Kansas City.

Not only does the evidence show that the market in Chicago is in a healthy state, and the receipts of livestock have been maintained in spite of the decrease in production in regions tributary to that city, but it also appears that, instead of the freight rates being so adjusted as to discriminate against Chicago, they are so made as to favor that market as against the packers at the Missouri river, South St. Paul, and intermediate points. Packing houses have been established at Cedar Rapids, Des Moines,

Marshalltown and Ottumwa, Iowa, and at Austin, Minnesota. There are other small packing houses at interior towns, but the principal ones are located at the points named, and each one of these points, as well as South St. Paul and Missouri river points, is handicapped by the adjustment of rates in favor of Chicago.

General Flower, president of the St. Paul Union Stockyards Co., testified, at page 775, that the train service is arranged to favor Chicago, and that it takes as long to get stock to St. Paul from a point, say 100 miles south of that city as it does to get it to Chicago, which is between 300 and 400 miles; that is, the train schedules are so arranged as to force the stock in that direction, if possible. On page 776, General Flower spoke of an interview that he had with the traffic manager of the Northwestern, in which he endeavored to have this policy changed, but without any result. Referring to Mr. McCulough, the traffic manager, he says: "He was very courteous and pleasant, but he frankly told me it was according to the policy of his line to do everything they could to increase its revenue, and that the long haul was what they were after, and that he could not do anything about changing the plan that they had adoped." And he shows, at page 777, that the chief competition is between South St. Paul and Chicago, and that the receipts of cattle and hogs from southern Minnesota points, near to South St. Paul, decreased during the five years from 1900 to 1904. Flower's Exhibit 1, appearing on pages 779 to 783, inclusive, is very in-

structive. It shows the receipts by carloads from the various counties in southern Minnesota, the distances from the county seats of those counties, and the rates on cattle, hogs and sheep to St. Paul and Chicago, respectively. A mere glance at this table is sufficient to show why, other things being equal, livestock would move to Chicago, when we take into account the rate on packing house products from St. Paul to Chicago or to the Indiana-Illinois state line, if the product is destined to the east. It will be seen that the sum of the rates on the livestock into St. Paul and the rate on the product from there to Chicago largely exceeds the rate on the livestock from the initial points to Chicago direct. Not only is Chicago favored in this way, but it is given a large advantage in the case of through shipments from the ranges of the northwest. On page 786 is a table showing the through rate to Chicago, and the rate to St. Paul, and the distances to those places, respectively, from points on the lines of the Northern Pacific, Great Northern and Soo Railways. This western country is naturally tributary to St. Paul, and not to Chicago; and still it will be seen that the rates from the range country in Montana to the two places, respectively, are so arranged that the rate into St. Paul, plus the product rate to Chicago, exceeds the through rate on livestock from the point of origin to Chicago. The only places where St. Paul is given any advantage are on shipments from certain points in the Red River valley. The proportional from St. Paul to Chicago had been raised just be-

fore the trial, in the effort to prevent manipulation of billing. Mr. Foster, of the firm of John Morrell & Co., Limited, pork packers at Ottumwa, Iowa, testified (page 644) that Chicago was a competitor with his house at nearly all the stations from which hogs were shipped to Ottumwa, and at page 642, says that the sum of the rates on hogs into Ottumwa and the product from there to Chicago, is in all cases higher than the through rate from the point of origin to Chicago, *and in some cases as much as ten cents a hundred more.* It having been suggested that this difference is somewhat made up in the loss in weight caused by killing and packing, it was brought out in the testimony of Mr. Foster that the weight of the product shipped out, including the casings, barrels or boxes in which it is placed for shipment, in and out, amounts to from 115 to 120 per cent. of the weight of the hogs shipped in, and that these boxes and barrels have to be brought to Ottumwa from points in Wisconsin and through the Peoria gateway in Illinois. This packing house at Ottumwa is a large concern, employing from 900 to 1,300 people, and they are enabled to do business with this handicap as against Chicago, largely by reason of the fact that there is no livestock exchange or band of commission men there to exact a commission upon the livestock sold to the packers. (p. 643.) It further appears that there was formerly a lower rate to Chicago on packing house products from Ottumwa than the hog rate, but years ago the Interstate Commerce

Commission changed it to an equality, with the result that Morell & Co. have lost to the Chicago packers 60 to 75 per cent. of the trade in Illinois territory naturally tributary to Ottumwa, which trade they formerly enjoyed (p. 643, 644). It will be seen that the Chicago packers are, by the adjustment of rates, enabled to ship the hogs through to Chicago and then send the product back on the same roads into this competitive zone in Illinois, and largely drive the Ottumwa packer out of the market.

Mr. Eberhart, secretary of George A. Hornell & Co., pork packers at Austin, Minnesota, testifies, page 657, and the following pages, with reference to the disadvantage under which his firm labors in competing with Chicago. On pages 659 to 663, there will be found a table showing the rates from various stations to Austin, together with the mileage to that point, and the rates to St. Paul and Chicago, with the mileage to those points, respectively. The court will also observe a column headed, "Our Rate," which is explained, on page 665, to be the rate that Hornell & Co. are obliged to make to shippers from various points to Austin in order to prevent hogs going through to Chicago. For instance, from the town of Bryant, South Dakota, 280 miles from Austin, the railroad rate is 29½c; while to Chicago, 632 miles, considerably more than twice as far as Austin, the rate is only 38c; and as the product of the Austin packing house has to be sold in competition with Chicago, and hence their prices are largely based upon Chi-

cago prices, it is impossible to take from the shipper the total product rate from Austin to Chicago and the hog rate from Bryant to Austin, as that would bring the price at the initial point so far below the Chicago price. Therefore, Hornell & Co. have to absorb a part of the hog rate into Austin, and in the case of Bryant, the part that that company absorbs amounts to 5½c a hundred, so that they make the rate to the shipper 24c, although the company itself is compelled to pay 29½c. On page 665 the witness testifies that the packing house rate from Austin to Chicago is the same as the St. Paul rate, 15.7c. The rate from Bryant, South Dakota, to Austin being 29½c makes an aggregate of 45.2c as against the direct livestock rate from Bryant to Chicago of 38c, or a discrimination in favor of Chicago and against Austin, of 7.2c. And still the Chicago Livestock Exchange is not satisfied, and claims that there is undue discrimination against it. The witness further testifies, page 666, that the livestock rate from Austin to Chicago, is 25c, and shows that if that rate was reduced to 15.7c, as the complainant asks, that is, if it was put on a parity with the packing house rate, a similar reduction would have to be made from all points beyond Austin; and therefore, the handicap of 7.2c under which Austin labors in competition with Chicago would be increased 9.3c more, or a total disadvantage of about 16½c, and even with the saving that is effected by buying hogs direct without a commission to the members of the Livestock Exchange, it would be impossible to do business at Austin with a profit.

Mr. Yapp, Assistant Secretary of the Minnesota State Railroad & Warehouse Commission, who has been for many years the statistician of that Commission, states that in the year 1902, there were received at South St. Paul 5341 car loads of cattle, hogs and sheep from points in southern Minnesota, as against 9305 cars af cattle, hogs and sheep shipped to Chicago from the same section, although the state line of Minnesota is only 120 miles south of St. Paul, and it is 400 miles to Chicago from St. Paul. (See pages 224, 225). He also testifies on pages 227 and 228, to the advantage possessed by the Chicago market over the St. Paul market on shipments fram points northwest of St. Paul. On page 229 he shows that in 1904, two years after the change in the rate which the complainants think so destructive to Chicago, there were listed for taxation in Houston County, Minnesota, 26,704 head of cattle. This is the county in the extreme southeast portion of Minnesota. The South St. Paul market did not receive a single head of these cattle. Fillmore County, on the southern border of the state, next west of Hauston, showed 32,992 head of cattle listed for taxation in 1904, and the St. Paul market received 21 head. There were 41,000 in Freeborn County, Minnesota, being another county on the southern border, about two and a half times as far from Chicago as from St. Paul, but only 318 head of cattle were shipped to the St. Paul market, and those counties are in the territory where St. Paul is in competition with Chicago. (See pages 229, 230). It further appears from his testimony

that while Swift & Co. has a packing house at South St. Paul, Armour & Co., Schwarzschild & Sulzberger, Armour Packing Co. and the National Packing Co. all have distributing stations at various points in Minnesota, which are supplied from Chicago, Kansas City and Omaha.

> "Q. The fact is that the farmers in Minnesota raise the hogs and cattle which are shipped through to Chicago, manufactured into packing house products and fresh meat and shipped back up into Minnesota to sell, isn't that true?
>
> A. Yes, sir." (Page 233).

Mr. Eaton, President and General Manager of the Sioux City Stockyards Co., prepared two very instructive tables, introduced as Eaton Exhibit A & B. See Record, pages 878 to 889, inclusive. These tables show an adjustment of rates on cattle and hogs distinctly favorable to Chicago as against Sioux City. It will be recalled that Sioux City is a Missouri river town, so that the product takes a 20c rate to Chicago, and it will be seen from this table that the through rates on livestock from South Dakota and other points naturally tributary to Sioux City are very much less than the sum of the livestock rates into Sioux City and the product rate out. We instance Madison, South Dakota, as a representative town. It will be found on the table at page 881. The distance to Sioux City is 150 miles. The rate on hogs 21c; the distance to Chicago 583 miles, the rate on hogs 32c. Add 20c on the product to the 21c, the in rate to Sioux City on

the hogs, and we have 41c as against the through rate on the livestock of 32c, or discrimination in favor of Chicago of 9c a hundred. It would seem that an examination of this table must be convincing that the claim of discrimination made here by the real complainants, the commission men of Chicago, is frivolous. In so far as there is discrimination in favor of one locality as against another, it is not against Chicago, but is in favor of Chicago and against the interior markets. Mr. Eaton corroborates General Flower as to the relatively better service to Chicago. See page 891.

Mr. Koch, Traffic Manager for T. M. Sinclair & Co., Limited, at Cedar Rapids, Iowa, testified, (page 598), that his firm slaughters about 600,000 hogs a year; that they have about a million dollars invested in their plant; that the bulk of their purchases of hogs is made in the state of Iowa. At page 600 he said that the average freight rate on the live animal from the points of purchase to the slaughtering house at Cedar Rapids, on Iowa shipments, was 11c a hundred, and the rate to Chicago on the finished product was 13½c. Having testified that it was necessary at times to purchase live animals at St. Joseph, Kansas City and Chillicothe, Missouri, he stated that the rate to Cedar Rapids from those points was 18½c and 15c respectively. At page 601 he said that his firm could not purchase hogs further east than the first tier of counties beyond Cedar Rapids, because of the rates; that the competition of Chicago in view of the adjustment of rates was such that it was impossible.

He illustrated that by reference to points along the Mississippi River, like Clinton, where the rate on the hogs to Cedar Rapids and on the product from there to Chicago would be 24c a hundred, while the direct rate on the livestock from Clinton to Chicago is only 15c. Under the present adjustment of rates there is only one outlet for the hogs, and that is Chicago. At page 602 he testified that the annual production of Iowa is about ten million of hogs; that there are slaughtered at the packing houses in the state outside of the plants at Sioux City approximately a million and a half.

Mr. Eaton testified, (page 893), that the total receipts at Sioux City are a little over 1,100,000. In view of the fact that a large number of the hogs at Sioux City come from outside of Iowa, it is probable that the sum of the million and a half and the 1,100,000 or 2,600,000, would fairly represent the number of hogs marketed at other points than Chicago. General Flower testifies that a large amount of packing house products moves east from St. Paul by way of the lakes. (See p. 795.) Mr. Yapp, at page 222, gives similar testimony. Nevertheless the live animal goes the long distance to Chicago rather than the short distance to St. Paul or other towns having easy access to lake ports. Mr. Koch sums up the rate situation in Iowa as between Cedar Rapids and Chicago, at page 604, by showing that the in rate to the packing house at Cedar Rapids on the live animal, plus the rate on the product from there to Chicago, averages 24½c, as against an average direct livestock rate to Chicago of 21c,

which is the advantage the Chicago packer has over the packer at Cedar Rapids. On page 605 he testifies that 35% of the product of his house is sold in Chicago, or on the basis of the Chicago local rates; the other 65% of the product is exported.

The seventh finding of fact of the trial court is:

"THAT THE RATES FOR CARRYING PACKERS' PRODUCTS AND DRESSED MEATS WERE REMUNERATIVE. THEY DID NOT PAY ANY PORTION OF THE FIXED CHARGES AND INTEREST OF THE RAILROAD COMPANIES, NOR ITS FULL SHARE OF THE OPERATING EXPENSES, BUT THEY DID PAY MORE THAN ITS COST OF MOVEMENT AND LEAVE SOMETHING TO APPLY UPON OPERATING EXPENSES."

It is unnecesary to discuss the testimony supporting this finding, as we have already called attention to Mr. Peabody's evidence and that of other witnesses, which shows that the court was justified in the conclusion stated.

The eighth finding is as follows:

"THAT THE WELFARE OF THE PUBLIC, INCLUDING THE SHIPPERS, CONSUMERS, AND ALL LOCALITIES AND MARKETS, DOES NOT SEEM TO BE MATERIALLY AFFECTED BY THE PRESENT RATES."

Mr. Baker, Secretary of the Livestock Exchange, on cross-examination identified the Chicago Daily Drovers' Journal of Monday, October 2nd, 1905, (Monday being the principal market day

as we have shown and the witness being on the stand Wednesday, October 4, 1905) and stated that it was a generally accredited journal, regarded as authentic and reliable by people who deal in livestock. (See pages 1450 to 1452). He read from this journal prices current at the Union Stockyards in Chicago for the day in question. An inspection of these prices, both for cattle and hogs, shows such a variation in price in the same grade of stock, that it is apparent that a difference of 3½c a hundred pounds, which is all that is complained of here, could have no appreciable influence in preventing cattle from moving to Chicago. Without going into these figures in detail, it is sufficient to say that the same grades of cattle fluctuate from twenty-five cents to a dollar a hundred pounds in a single day; and hogs of the same grade vary from 7½c a hundred to as much as $2.25 a hundred on the same day. It being established that prices fluctuate to the extent shown in the list quoted from, and that the Chicago market has prospered even more than the other markets since the present rates were in force, it seems clear that the court was bound to find, as it did, that no undue discrimination was practiced against the Chicago market. What amounts to undue discrimination is a question of fact dependent upon the circumstances of the particular case. The testimony bears out the finding of the court that such discrimination did not exist; that the markets have not been affected; that cattle and hogs have not been diverted from the Chicago market.

There has been a practical test of the question as to whether a very extreme change in the rate would make any difference in the movement of the traffic. At the time the Great Western contract was made, the Atchison, Topeka & Santa Fe Railway Co. put in a rate of 12c a hundred pounds on livestock from Kansas City to Chicago. (See Ripley's testimony, page 1142). The Santa Fe has never agreed with the other roads as to the matter of rates on livestock and packing house products, and is alone obeyed the order of the Commission and put in a 20c rate on livestock from Kansas City to Chicago, so as to have that rate on a parity with the 20c rate on the product. At page 1142 Mr. Ripley stated that he regarded the 20c rate as too low, and the 23½c rate which the other roads charge from the Missouri River zone, as too low. He then gave the following testimony:

> "Q. Then why was it that you put a 12 cent rate in force at the time these packing house rates went in? You put in a 12 cent rate, did you not, on livestock from Kansas City and intermediate points to Chicago?
>
> A. We did for a while. Well, without going into it at any very great length, it occurred to us, when this reduction was made in the packing house product and dressed beef, that it was so outrageous that it ought to be fought out. Our first disposition was to fight it out. We put in a rate of 12 cents, thinking possibly it would bring about a reform, and without having made very many figures on it, simply guessing at it, it was our opinion that the 12 cent rate on cattle was about as good as the 20 cent rate on packing house product; but we modified our position in that regard, after a little while, and advanced our rate."

Mr. Peabody testified, (pages 1375, 1379 & 1380), that no more stock moved over the Santa Fe road while that 12c rate was in, than before. He states that they had this reduced rate, which was 11½c under the rates by the other lines, in force for four months and twenty days, and took it out because it did not have the effect that they thought it would have. He says the other roads did not meet the rate, and that he had examined the record, and thought it did not increase their relative shipments during those months, and that they shipped more stock the year after, with the 20c rate during the same months of the year, than they did when the 12c rate was in force.

There is another matter that should be considered, which justifies the existence of the markets on the Missouri river and at St. Paul, and that is the desirability of near-by markets. Cattle and hogs when transported for long distances suffer a great shrinkage in weight. Mr. Sykes, a stock raiser and shipper of livestock living at a town in Iowa, who was called by the complainant, testified, at page 1186, that a car load of stock weighing from 24,000 to 26,000 pounds, would shrink in transit from his station to Chicago, from 1500 to 2000 pounds. He lives at a place 438 miles from Chicago. (Page 1170).

Taking the average shrinkage between the two figures he names, as 1750 pounds, and we have a loss of $70 a car load, computed on the basis of $4.00 per hundred pounds, which is less than the

average price given by the Drovers' Journal quoted by Mr. Baker at page 1451.

Mr. Kenyon testified, pages 1011 & 1012:

> "You have said that hogs were supposed to travel short distances to market. Why?
>
> A. It is generally supposed that taking the summer months, the hogs lose in weight by reason of the hot weather. The hogs are raised more plentifully than cattle. Shippers seem to desire to make their markets for them at near by points. * * * *
>
> I think hogs will shrink more traveling 500 miles than they will in traveling 100, and I think a steer will shrink more, too.
>
> Q. So do I. Is it an advantage to the shipper, therefore, to have a near by market?
>
> A. It usually is."

Under another head we have called attention to the necessity of spraying livestock in warm weather to alleviate their sufferings in transit, and to the fact that stock frequently get down in the cars and are killed, so that reasons of humanity would seem to require that they be slaughtered as near to the point of production as possible, and it must be that the product is more suitable for human food when the stock is not compelled to undergo the hardships of a long journey. Mr. Kenyon gives another series of reasons why it is an advantage to a shipper to have a near by market, at page 1012, as follows:

> "When the near by market relatively pays him as good a price as the distant market and he has less freight to pay. He has less shrinkage on his production. It enables him in many cases to get his money quicker. He does not have to be so long away from home."

All these things are proper to take into consideration in determining the question of whether there is *undue* discrimination in favor or against any particular market or class of traffic.

The last finding of fact is in substance that

> WHILE IT IS THE USUAL CUSTOM FOR RAILROADS TO CHARGE A HIGHER RATE FOR THE FINISHED PRODUCT THAN FOR THE RAW MATERIAL, THAT RULE IS NOT UNIVERSAL, AND FOR SIXTEEN YEARS OUT OF TWENTY-THREE BETWEEN MISSOURI RIVER POINTS AND ST. PAUL AND CHICAGO, THE PUBLISHED RATES ON LIVESTOCK WERE HIGHER THAN ON DRESSED MEATS AND ON PACKING HOUSE PRODUCTS.

Mr. Hiland testified, page 509, that he had in mind a case where the manufactured product was charged materially less than the raw material, and he gives the reason for giving a lower rate on cotton goods from the South than on raw cotton, as follows:

> "If I was engaged in the handling of the traffic I would make the raw material, if possible, I would make the rate so that the raw material would be used as near where it is raised as possible, and to ship it out to New England if I could get a higher rate than the manufactured product, I would make it.
>
> The Court: Why would you do that?
>
> A. I would do that for the purpose of developing the country that the railroad for which I was employed might increase their traffic, and they would increase it by reason

of getting a greater population, more passenger traffic and more incidental freight traffic and would encourage the further development of the soil itself. Instead of having 160 acres cultivated I would want 640 cultivated and to do that I would make it an object to have the material manufactured so that it could be placed in less bulk and distributed where it would in the end realize to the producer a greater value than would the raw material it shipped into New England in the larger volume."

At page 1377 Mr. Peabody's attention was called by counsel to certain items in the tariffs of the Santa Fe, which he was asked to look up, but we do not find in the printed record any further reference to the matter. It was conceded upon the trial, however, that the figures were correct, and they show a number of items upon which the finished product takes a lower rate than the raw material, as, for instance, pig iron, $3.08 per ton from Chicago to Kansas City, rails being the product $2 per ton; malt 10c per hundred, barley 15c per hundred, malt being the product of barley; paint 17c per hundred, linseed oil 27c per hundred, turpentine 27c per hundred, the oil and turpentine being the material from which the paint is manufactured. And more significant than this, because it shows a practice absolutely opposed to the relation of rates now contended for by the Commission, attention is called to page 1374, where it appears by Appendix G to the 16th Annual Report of the Interstate Commerce Commission, entitled "A Forty Year Review of Changes in Freight Rates," that for sixteen years

and seven months out of a total period of twenty-three years, extending from 1879 to 1902, the rates upon live cattle to Chicago were higher than the rates upon the product of cattle by from 5c to 7½c, and that during about one and a half months of that period the rates on live cattle were from 17 to 20c higher than the rates upon the product; and that during the same period for fifteen years and six months, the rates on live hogs from Kansas City to Chicago were higher than the rates on their product by from 5c to 11.64c per hundred; and that the rates on live cattle from Kansas City to St. Louis were higher than the rates on their product for sixteen years and ten months out of said period of twenty-three years by from 5c to 15¼c.

In conclusion it is respectfully submitted that upon the evidence in the case, the findings of fact of the trial court are abundantly sustained by the testimony, and it will probably not be seriously controverted that if the findings of fact are correct, the decree of the court below must be affirmed.

Respectfully submitted,

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